*United States Court of Appeals*
*for the Second Circuit*

# JOINT APPENDIX

# 76-7207

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## United States Court of Appeals
### For the Second Circuit

Docket No. 76-7207

PRUDENTIAL OIL CORPORATION,
*Plaintiff-Appellee,*

*vs.*

PHILLIPS PETROLEUM COMPANY,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**(67 Civ. 3748 (C.L.B.))**

## JOINT APPENDIX
### Volume V—Trial Transcript, 1576-2320

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PRUDENTIAL OIL CORPORATION

vs. 67 Civ. 3748

PHILLIPS PETROLEUM COMPANY.

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New York, January 20, 1976;
10.30 o'clock a.m.

(Trial resumed.)

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(Jury not present.)

THE COURT: I understand somebody wants to see me before the jury comes in?

MR. MacCRATE: Yes, your Honor.

Your Honor, with respect to plaintiff's statement yesterday regarding Mr. Oscar Chapman, the facts are that interrogatories were propounded in accordance with Rule 31. It was a perfectly regular pretrial procedure.

THE COURT: Nobody charged any irregularity as far as I know.

MR. MacCRATE: And it has right up until yesterday been the basis upon which evidence from Mr. Chapman would be placed in the record. This was the understanding of both parties.

There is nothing that has changed to affect that in any way or which would lay the basis for resorting to pretrial proceedings at this time.

I and my colleagues havebeen in touch with Mr. Chapman's office yesterday after court. We have made inquiry of them and there is in the courtroom this morning one of Mr. Chapman's partners who would be prepared in camera to inform your Honor with respect to Mr. Chapman's situation. In view of the personal delicacy of some of what would be presented to your Honor we ask that it not be a public proceeding.

THE COURT: You present several difficulties. One of them is a very basic difficulty with me. I am anxious to keep the discipline of the jury intact in this case and one of the ways to do it is to start on time. It is now ten minutes past the schedule starting time and I find that if the jury are asked to come in at 10.30 and we don't start at 10.30, they get the notion it is all right to come 15 minutes later and then when we are here they are not here.

I think it is important to go forward until the next recess and then take it up at that time.

I might also say two things stand out about this problem. One is it is not so much the issue of his health, the issue is what is he doing if he is engaged and represented in active practice of law, that is a little different picture than the picture of a person who was described on page 4 of the interrogatories.

MR. MacCRATE: That is a false picture that is presented to you by plaintiff's counsel.

THE COURT: I will take the testimony of the partner as to the work that he is doing and I would be prepared to presume that his health is not materially changed in the absence of a showing to the contrary.

But there is another further difficuloty. We are now on the defendant's case. It is not clear at this point whether there is anything to rebut. It would depend on Mr. Chapman and the plaintiffs have not excused themselves from failing to raise this problem before they rested. They knew about it last week. If they knew about it last week at any time it would seem with reasonable diligence they could have known about it at the beginning of the week or perhaps even before the trial began.

You come into court and tell us there is a change in circumstances and the man is working full time in the law firm and ought to be deposed.

MR. FARRELL: Just the other day Mr. MacCrate said to the Court that Mr. Chapman was too ill to testify.

I accepted that at face value. It was said in chambers again and I must say I had no reason to doubt Mr. MacCrate.

I would normally have taken -- I would have let it go. As a result, however, of the fact that Mr. Chapman changed his deposition in a material and I will say rather ambiguous way, I thought we would try to find this out and we simply telephoned his law firm. We didn't disguise who we were. We just called up and --

THE COURT: I don't think the change is very material.

MR. FARRELL: You see what he tried to do, your Honor, on page 26 of the transcript he recalls the meeting. He does not give the same version of it that Mr. Anderson or Mr. Shippee did but he recalls the meeting which was placed originally on July 2. In his affidavit correcting the transcript he says I was not in New York on July 2. That is not a debater's point, your Honor. It does not mean, although I am sure that is the impression that the defendants wish to convey, that does not mean that he did not attend the meeting or that the meeting did not take place on another day.

THE COURT: Wait a minute. I am looking at Paragraph 3 of the May 31, 1975 affidavit. I read it as saying I recall now that I had other commitments on that day in New York City.

MR. FARRELL: I think it means that he did not meet with Mr. Anderson.

THE COURT: He didn't say he wasn't in New York.

MR. FARRELL: But he said he did not meet with Mr. Anderson.

THE COURT: You have Anderson here.

MR. FARRELL: But, your Honor, he said in his original testimony, in page 26, that he had attended that meeting. He now says in effect he did not attend that meeting on July 2. That does not mean he didn't attend a meeting as described by Mr. Anderson or Mr. Shippee. That is a very important point and I think we should clear it up.

He may have said it wasn't the 1st of July or the 26th of July but the clear impression conveyed now is he wasn't at that meeting.

THE COURT: I want to start with the jury now for the reasons I previously mentioned to you.

MR. FARRELL: I have something else.

THE COURT: We will continue with this at the earliest possible opportunity.

ars

MR. MARKS: We need the retainer agreement of Mr. Chapman in connection with the cross-examination. We have the matter then of the annual reports furnished which should be marked.

THE COURT: The Clerk will mark that for identification.

MR. MARKS: And we will need something with regard to those because of the information that we have now seen for the first time.

(Plaintiff's Exhibit 235 was marked for identification.)

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MR. MARKS: They are the 1973 and 1974 statements for the Phillips Puerto Rico Core.

(Cotninued on next page.)

MR. MacCRATE: I suggest, your Honor, that with respect to those financial statements, it can be deferred since I assume there is nothing for Mr. Learned in the '73 and '74 financial statements.

MR. FARRELL: That's correct.

THE COURT: All right.

MR. MacCRATE: With respect to the documents for which I have claimed a privilege, I would submit them to your Honor, and request that you rule at this time whether I have privilege in respect to this as you indicated.

THE COURT: I will examine the documents in camera and ascertain whether they contain a confidential communication, number one, and number two, whether the Phillips Petroleum Company has waived it by the line of inquiry.

MR. MacCRATE: I have included related documents.

THE COURT: I don't think you need a ruling on that right at this instant.

MR. FARRELL: All right, your Honor.

THE COURT: Please invite the jury to come into the courtroom.

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STANLEY LEARNED, resumed.

(Jury present.)

THE COURT: Good morning, members of the jury.

CROSS EXAMINATION

BY MR. MARKS CONTINUED:

Q Mr. Learned, I believe you testified yesterday that after your conversation with Mr. Chapman, when you say he called you out of the blue in August, 1963, that Phillips began to conduct studies concerning Algerian feedstocks for this refinery, is that correct?

A If I did, it was a mistake, because I started those studies, I asked for those studies before Mr. Chapman called me and I intended to testify that, I mentioned that, if I remembered right, I mentioned it, if he had called me a couple of weeks sooner I wouldn't have even been interested.

Q After your conversation with Mr. Chapman, did Phillips conduct very intensive work and study and devote a lot of manpower to this Algerian question?

A It is my understanding that quite a bit of work went on.

Q In fact, that study that Mr. MacCrate showed you yesterday, that PEA study, that was relating to this Algerian refinery?

A It was a combination, but it was -- it came after we had talked to Mr. Chapman.

Q But most of the work that was done on that was done after August of 1963?

A No. I wouldn't say. There was a lot of work done before that.

Q Didn't Mr. MacCrate show you a report that was prepared and submitted to you, I believe in the end of September?

A Yes.

Q That was the product, final product of the evaluation of your staff of the Algerian matter?

A Of the Puerto Rican, European, Algerian. I don't know whether that was the final report or not. He showed me one, and there may have been subsequent ones on that subject.

Q As a matter of fact, Mr. Learned, that was all discarded, wasn't it, by Phillips, the Algerian matter?

A It was eventually, yes, sir.

Q There wasn't any Algerian oil used in this Puerto Rican project?

A Yes, that's correct.

Q And these studies that had been done were not utilized, that is of the Algerian matters?

A I don't believe I can answer that one way or the other.

Q They weren't used in Puerto Rico, were they, the studies about the cost in Algeria and how you're going to refine the stuff in Algeria and so on?

A There were developments that occurred between the time of the preparation of that report and the finalization of the Puerto Rican project that made a complete change in some of the conditions in which we were operating.

Q But the point that I'm trying to establish is that that material was not used in the project that was done by your staff, is that right?

A Well, I don't think I can say that, because there are parts of that that were important to the complete consideration of the matter.

Q But anything having to do with Algeria, sir, was never used in this project, isn't that right?

A Well, I will have to say yes to that.

Q In fact, you had to promise the Secretary of the Interior that you were not going to use any oil from Algeria for this project, is that true?

A This is exactly the point I wanted to bring up, that the subsequent --

Q Will you just answer my question yes or no; did you have to promise the Secretary of the Interior?

MR. MacCRATE: I object, your Honor, to interrupting the witness.

MR. MARKS: I'm just trying --

THE COURT: Read back the question, please.

(Question read.)

A Yes.

Q And you had to promise the Secretary of the Interior in order to do this project that you would use oil that came from the Caribbean area if at all feasible?

A I believe it was the western hemisphere, but maybe it was Caribbean, but I thought it was western hemisphere, if my memory is right.

Q Did anybody from Phillips go down to Puerto Rico to look at sites or do anything in connection with the project from August of 1963, when you spoke to Mr. Chapman, until mid December 1963?

A I do not know.

Q Did anybody at Phillips, from August of 1963 until the middle of December of 1963 meet with anybody from the Economic Developmen Administration to discuss this?

A I can't answer that because I don't know who all Mr. Diaz-Hernandez may have talked to.

Q The first time you met Mr. Diaz-Hernandez as I understand it was some timein the middle of December, when he came to Bartlesville?

A I think that's correct, as far as I'm concerned.

Q Was that the first time you had met Mr. Coan as well?

A I think probably.

Q You testified about a conversation you had with Mr. Chapman in August, 1963. Then you testified about a conversation you had with Mr. Chapman concerning his retainer in November of 1963.

Can you recollect any conversations that you had with Mr. Chapman between those two conversations?

A No, I don't recollect.

Q Mr. Chapman was retained by Phillips as a lawyer to render professional legal services for this project is that right?

A When you use those terms, I'm not sure that I can say yes or no to it. I think the retainer agreement will speak for itself.

Q Didn't you retain him as a lawyer?

A That's what I thought I was doing.

Q Didn't you pay him for legal services?

A But when you use the terms, certain kinds of things being respective, I don't know legal terms that well.

Q Didn't you know you were hiring him to be Phillips' lawyer? That's what you were paying him for.

A Yes, sir.

Q And you were paying for the legal services he was rendering?

A Yes, sir.

Q Anything else?

A Well --

Q Weren't you paying him for his professional services?

THE COURT: The witness started to answer. You asked him "Anything else?" and he began to answer. All I heard was the word "Well."

MR. MARKS: I will reframe the question.

THE COURT: Leave the question open. The Court wants to hear his answer.

THE WITNESS: Will you read what went ahead of that? Can I ask that, your Honor?

THE COURT: Never mind.

Frame another question, Mr. Marks.

Q Did you give to Mr. Chapman any equity interest in this project?

A No.

Q Did you give him any stock?

THE COURT: By "you," he means Phillips

Petroleum Company.

A No.

Q The only thing that you paid him was as a lawyer for rendering professional services to Phillips, is that correct?

A We gave him a success fee or whatever you call that.

Q For his legal work?

A Well, I agree with that.

Q With regard to Omega Management Corporation you retained them, did you not, as consultants to render professional services to Phillips in connection with the project, is that correct?

A That's correct.

Q And you paid them for their professional services, for those services they rendered to Phillips in that connection, correct?

A Correct.

Q Did Mr. Coan or Omega Management receive any equity interest in the project?

A No.

Q Did they receive any stock in the project?

A No.

Q The only thing they received was fees for the professional services that they rendered to Phillips pursuant to their agreement, is that correct?

A They received a success fee, also.

Q Were Mr. Coan or Mr. Chapman going to play any role whatever in the management or operation of the project?

A Not that I know of.

Q And you knew, sir, did you not, that Prudentail Oil Corporation, when you spoke to Mr. Anderson in November of 1962, was going to manage and operate this project, didn't you?

A Will you repeat that again?

THE COURT: Reframe the question.

Q In November, 1962, when you spoke to Mr. Anderson and he told you about the project, you knew from Mr. Anderson that Prudential Oil was going to manage and operate the project, did you not?

A Well, I assumed that.

THE COURT: Well, did you assume it on the basis of something that Mr. Anderson told you?

THE WITNESS: He told me specifically that if he could get this source of crude established and the sale of the products that weren't used in Puerto Rico, that they would get an import quota.

Q And they would build the project in Puerto Rico, Prudential, you were going to counsel them in that endeavor?

A This would follow.

THE COURT: Are you in the habit of counseling other people how to build refineries?

THE WITNESS: At times.

Q Do you recall any other letter that you have written where you offered to counsel and assist another oil company in the development and the operation of a petrochemical complex?

A Well, I'd have to go back and go through records and things like that before I could answer that question. I don't recall it right now, no. I'm sure we have.

THE COURT: In effect, you were setting up a competitor?

THE WITNESS: Well in reality, it comes to my mind right now that when the Commonwealth Refinery was built that Phillips made a back to back arrangement, but I may be wrong on this. It may have been just discussed, but this is one that comes to my mind as I reflect on it here.

THE COURT: He's asking you about giving advice in the design and construction.

THE WITNESS: This same thing occurred there.

THE COURT: It did?

THE WITNESS: Not in as much detail as we were asked to do by Prudential.

Q You didn't have any understanding, did you, that Prudential was going to be rendering professional services to Phillips, did you?

A No.

Q They were going to have the management operation and equity in this project, wasn't that your understanding?

A Yes, sir.

Q You testified yesterday, sir, that you had a meeting with Mr. Chapman in November of 1963 to discuss his retainer, is that correct?

A Correct.

Q And you testified that at that meeting you inquired whether there would be any other obligations of Phillips.

A That's correct.

Q And Mr. Chapman told you no, is that correct?

A Other than Omega.

Q He told you that?

A Yes.

Q Did you discuss with Mr. Chapman in this November, 1963 meeting concerning his retainer Mr. Shippee or Prudential?

A Did I discuss with him? No. Unless you interpret what I just said about it. I didn't say anything to him about -- I didn't use the name Prudential, I"m sure of that.

Q The names didn't come up in your conversation?

A I don't think the name Shippee came up in the conversation.

Q Mr. Learned, you testified, did you not, at depositions in this case for three full days, did you not?

THE COURT: You know, nobody could care how long the depositions took. Please save my time. Save the jury's time, and save the witness' time.

If there are a dozen days, I don't want to hear about it. Just ask him about the case.

Q In connection with your deposition testimony, Mr. Learned, didn't you review the documents that were available to Phillips to refresh you recollection concerning events prior to testifying before trial?

A I think I'd have to say know to what you just asked.

Q Didn't you go down to Mr. MacCrate's office and spend several days before your testimony, reviewing the documents before we questioned you?

A Yes, but whether we reviewed all the documents is what's bothering me when you ask the question that you did.

Q Was your recollection better in 1976 -- is your recollection better in 1976 than it was in 1972, sir?

A I don't know that it is.

Q Do you recall testifying on February 10, 1972, and being asked this question and giving these answers, starting on page 190, line 14:

"Q Did Mr. Chapman discuss with you the manner in which he wanted his compensation to be rendered?'

"A Yes, sir.

"Q And what did he say in that connection?"

Then there was some colloquy.

Then on page 192, line 23:

"MR. FARRELL: I'm only asking what Mr. Chapman said he wanted and this is prior to the retainer agreement because as of November 4th there was no retainer agreement."

And then on page 193, line 9, you answered:

"A I think what he said is reflected in the agreement we entered.

"Q What did he say (referring to Mr. Chapman)?

"A I don't remember it. I would have to have the agreement.

"Q Would the agreement refresh your recollection as to what he said? (Referring to Chapman)

"A Well, what I am trying to say to you is I don't remember what Oscar Chapman said, and the only thing that I could be sure of would be what was in the agreement. This is a long time ago."

And then at page 197 of the same deposition --

MR. MacCRATE: I object to omitting the interceding questions.

THE COURT: You see, I don't have a copy of it, so it is difficult for me to rule on this. But if you have omitted something that ought to be read, I will have it read.

MR. MARKS: All right, if Mr. MacCrate wants me to read it, on 193 --

THE COURT: I'm going to make a rule around here. No more use of depositions unless the Court is in possession of the original.

MR. MARKS: All the originals are in the possession of Sullivan & Cromwell.

THE COURT: Some are here and some are not. I have some on the bench.

"Q I understand that. I am just trying to refresh your recollection or trying to find out any way we can. You say you have to see the agreement.

"A That's the only way I -- he wrote the agreement and I accepted it and there's no question in my mind that we had discussions around the particular things that are in the agreement, but I don't know what they are."

And then, page 197:

"Q Did he (referring to Mr. Chapman) tell you his estimate of how much his legal fees would be for obtaining the oil quota in connection with the Puerto Rican venture?

"A This was in the agreement.

"Q Did he mention it before the agreement?

"A I don't know, but I am sure he must have at some time. I have no way of knowing.

"Q You don't recall it?

"A No, I don't recall, I don't recall those conversations. I'm sorry."

You didn't testify, did you, before trial, before yesterday, Mr. Learned, that you had any discussions with Mr. Chapman about whether Phillips owed any obligation to anybody else? You made -- you uttered that testimony for the first time yesterday, isn't that right?

A I don't know that. I'm sorry. I'd have to read my deposition again.

Q You deny being asked the questions and answers that I have just read you?

A I don't know what else was in the deposition. I'm sorry.

Q You testified yesterday on November 18 or 19, 1963 you went to visit Mr. Anderson in his New York office with Mr. Adams, is that correct?

A I said that, yes.

THE COURT: Everybody heard that.

Q What was the purpose of that visit, sir?

A I wanted to talk to Mr. Anderson about the decision that Phillips had made.

Q What prompted you to go to Mr. Anderson's office to talk about that?

A I think it was on the 7th of November that we entered the agreement with Chapman, partial agreement, the success fee they called it. Later on, the 10th of November, I went to Chicago to the American Petroleum Institute. I don't know what occurred at that point.

Q You wanted to talk to Mr. Anderson about Prudential?

A What I am trying to say to you is it came back to me in my memory while I was at the meeting in Chicago, at the API, the American Petroleum Institute, that this letter had been written.

What prompted that, whether there was a call from Bob Anderson to Adams or he may have reminded me that I had written that letter the year before, I don't know.

Q You became concerned about the fact that you had written a letter to Prudential Oil Corporation about the same project and you wanted to talk to Mr. Anderson about it?

A I had written one that we would cooperate with him.

Q You wanted to talk to Mr. Anderson about that?

A Something caused me to make the decision to go and see Mr. Anderson on November -- when we were in New York, which was the following Monday.

Q You wanted to talk to Mr. Anderson about Prudential and your letter?

A To know just one thing and that was that Phillips was going to make a direct application of its own.

Q This was a switch?

A Well, it could be interpreted by Bob that way. I don't think it was.

Q Bob is Mr. Anderson?

A Yes, Mr. Anderson.

Q That was a switch on the original understanding, wasn't it, that Prudential was going to get the oil import quota, isn't that true?

A Well, I would have to say no to what you say.

Q Why did you think it was important that you were going to tell Mr. Anderson in November 1963 that Phillips had decided to get the oil import quota on its own?

A What I am saying to you is that Phillips had decided to apply for it. Applying doesn't mean you get it.

Q Why did you think it was important to tell that to Mr. Anderson?

A I felt that having this previous conversation a year before that he was entitled to know that Phillips was going to make an application. We signed this contract with Chapman and what prompted me, I think along with that other, whether he called Chicago, I just don't know.

Q You were concerned about he fact that Prudential might have an interest at that time, is that why you went to see him?

A No, sir.

Q Are you sure that it was in November 1963?

A I am almost positive of it but my mind is not perfect and I tried to explain why I think I decided to go see Mr. Anderson at that time.

Q Let us get the chronology. In January 1963 Phillips applied for an oil import quota, is that correct?

A After we had been to Puerto Rico, correct.

Q Then there was a hullaballoo in the industry and in July 1964 there were hearings and in March of 1965 Secretary Udall announced that he planned to grant the quota?

A I think it was earlier than that, I think in February 1965.

Q But, Mr. Learned, could you be mistaken, sir, about your conversation with Mr. Anderson and when it took place about Prudential and the oil import quota?

THE COURT: That is a compound question.

Q Could you be mistaken about the time the meeting took place? It wasn't in November 1963 but it was in fact after Secretary Udall had announced that the quota was going to be granted to Phillips? Could you be mistaken?

A The conversation I just talked about I don't believe I could be.

Q If you hadn't spoken to Mr. Chapman about Mr. Shippee and Prudential, what led you to speak to Mr. Anderson about Shippee and Prudential in November of 1963?

A Something prompted my memory while I was at the American Petroleum Institute, about the letter that

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had been written to Mr. Shippee at Mr. Anderson's request. I just can't tell you how, why my mind seems to come up with something like that and other things it won't.

Q You told Mr. Anderson he should tell Mr. Shippee and Prudential Phillips was going to apply for a quota at that time?

A I don't know exactly what I said.

Q What is your best recollection what you told him in November 1963?

A My recollection is that Mr. Anderson made a statement to me he would advise Mr. Wright and Mr. Wright would advise Mr. Shippee and Mr. Willey and if my memory is right, he said for me to advise the others.

Q What others?

A Well, I think he was talking about -- I never asked him unfortunately -- but the investment bankers with which Prudential had been dealing probably but why he would want me to do it rather than do it himself, I don't know.

Q Were those investment bankers Kuhn Loeb and E. M. Warburg?

A I believe it was.

Q How did you know that?

A I don't know that Prudential didn't have others.

Q How did you know that?

A This I don't know.

Q Wasn't that in the Prudential brochure?

A Well, subsequent to the time -- let me explain to you. These things necessarily -- I didn't necessarily know it at that time but subsequent to that time I got calls from representatives of -- I can't tell you now whether Kuhn Loeb or Warburg, but Sidney Censer, formerly president -- I shouldn't say formerly but president of Standard of Ohio at one time, he called me and I think he was with Kuhn Loeb but could have been with Warburg -- my memory doesn't tell -- but he raised the question about financing for the project and this I think occurred shortly after the inquiry was made to the -- I mean the request made to the Department of the Interior. It could have been made sooner than that, I don't know.

Q You knew these investment bankers had been working with Shippee and Prudential Oil on the project?

A I think he told me at that time that they had.

Q Had you heard from Mr. Shippee between November 1962 and your conversation with Mr. Anderson in November of 1963?

A I had not.

Q Had you spoken to Mr. Chapman about Mr. Shippee between November 1962 and November 1973?

A I don't think I said anything to Mr. Chapman because I didn't have this memory until I got back to Chicago.

Q Mr. Learned, if you hadn't spoken to Mr. Shippee for a year and you hadn't spoken to anybody about Mr. Snippee for a year, what was it that led you to talk about Mr. Shippee with Mr. Anderson in November of 1963?

A I tried to tell you that I remembered the letter I wrote at Mr. Anderson's request.

Q It wasn't any suggestion by anybody perhaps Prudential is involved in the picture, you better get this straightened out now?

A No, there was not any suggestion.

Q Just a recollection you had wrote a letter?

A Yes.

Q Do you know, sir, your testimony was taken in this case in February, March, 1972?

A That is correct.

THE COURT: I have that already, Mr. Marks.

Q Do you know Mr. Anderson's testimony in this case was taken after your testimony?

A I do.

Q He testified in October of 1972, after you had completed your testimony?

A I do.

Q You know, sir -- do you know Mr. Anderson in his testimony stated that the conversation between you and him and Mr. Adams didn't take place when you told him that Phillips was going to pursue an independent course until 1965 or 1966?

MR. MacCRATE: Objection, misstatement of the record.

THE COURT: I will sustain the objection but not on that ground.

The jury will disregard the question.

Q Do you know what Mr. Anderson testified --

THE COURT: I am sustaining the objection to that.

Q Were you told what Mr. Anderson had testified concerning the date of the meeting you had with him?

A I don't think so.

Q Weren't you told that Mr. Anderson testified that the meeting took place in 1965 or 1966?

MR. MacCRATE: Objection.

THE COURT: Sustained.

Q Was there any other purpose of your visit to Mr. Anderson with Mr. Adams apart from talking about

Prudential and Shippee?

A I don't remember but this was the only thing I had.

You are talking about November of 1963?

Q Yes, sir.

A I don't remember anything else they may have discussed. That was the only item that I had in mind.

Q Now, sir, I ask you if you recall being deposed in this case and being asked these questions and givint these answers starting at transcript page 67, line 8:

"Q Mr. Learned, subsequent to the letter of November 13, 1962 did you speak to Mr. Anderson about the project referred to in this letter?

"A Oh, yes.

"Q When was the next conversation you had with Mr. Anderson about this project after November 13, 1962?

"A Oh, I am not sure.

"Q Can you recall the next conversation with him no matter when it was?

"A I can recall some conversations with him but to tell the next one, I just couldn't do that because I wouldn't be positive.

"Q Tell me then the conversations without telling me whether they were the next one."

And then on the next page, line 9:

"Q I said when was the next conversation with Mr. Anderson concerning the project referred to in the letter?

"A I think it was, I would guess it was about three years. This had to do with the problem he had brought out, he wanted me to talk to Mr. Shippee.

"Q In other words, you did not talk to Mr. Anderson about the project referred to in the letter of November 13, 1963 between 1962 and 1965?

"A I can't tell you for sure. You asked me whether I could tell on any conversations and I can't recollect any other but there may have been some.

"Q Did you discuss with Mr. Anderson a Puerto Rican oil project after November 13,1962?

"A A Puerto Rican what?

"Q Oil project, any project?

"A I think back about there I was talking about an oil refinery project.

"Q Did you talk to Mr. Anderson about a

project to build a refinery in Puerto Rico at any time in 1963 to your knowledge?

"A Who to build?

"Q Anyone to build.

"A I am not sure, that is why I said to you, I have already told I can remember positively another one having to do with this project in 1965.

"Q Right.

"A I didn't do anything in 1963 if my recollection is right."

Then again on pages 87 and 88 of your transcript, starting at line 19:

"Q Do you remember any conversation with Mr. Anderson after that letter having to do with Puerto Rico?

"A Any time what?

"Q After the letter, that letter having to do with Puerto Rico?

"A Any kind of something he said in there. I didn't get it.

"Q I said do you remember any conversation?

"A Yes, I have had a conversation with him in I would guess in 1965 or 1966. I just don't remember which.

"Q Was that the first conversation with Mr. Anderson that you had since your conversation in November of 1962?

"A The first conversation?

"Q Relating to Puerto Rico.

"A Yes, that was.

"Q Or relating to a petrochemical project in Puerto Rico?

"A That's right.

"Q Or relating to a refinery in Puerto Rico?

"A That's right."

Did you give those answers to those questions in 1972, sir?

A If you read the deposition correctly, I gave those answers.

(Continued on next page.)

Q And again on page 406 of the same deposition, sir, on line 14, you were asked:

"Q After the letter of November 13, 1962, did Mr. Anderson ever speak to you about the status of Phillips' dealings with Prudential?

"A Read me that question, again."

The question was read.

"A The answer has to be yes, because he spoke to me in the references I have already made in connection with trying to get rid of the lawsuit.

"Q Was that the first time he spoke to you about that?

"A I think so.

"Q Did he make to your recollection, any inquiries in early 1963 about the dealings between Prudential and Phillips?

"A Not to my knowledge.

"Q Did he ask you about the progress of the negotiations referred to in your letter at any time?

"A I don't think so. I just don't have any memory of it.

"Q Am I correct if I say that at no time between November of 1962 and the meeting in 1965 did Mr. Anderson ask you anything about the dealings between Phillips and

Prudential?"

And Mr. MacCrate said:

"I object to the form of the question. The meeting that was referred to, I believe, was in 1966.

"MR.FARRELL: I am sorry. I will amend the question."

And you said:

"Read the question," and the question was read as amended as follows:

"Q Am I correct if I say that at no time between November, 1962 and the meeting in 1966 did Mr. Anderson ask you anything about the dealings between Phillips and Prudential?

"A I would not want to say positively, be cause I don't have that good a memory but if there was such a question it would have been whether any contracts had been entered into between Phillips and Prudential but I don't remember if that ever arose."

Didn't you give that testimony, sir?

A If you read from the deposition, I gave it.

Q And you were under oath at the time?

A I was.

Q Isn't it true, sir, that you made up the testimony that you gave yesterday because you learned subsequent to your deposition, when you testified under oath, that this date was going to be very important in this litigation?

A No.

Q In fact, Mr. Learned, it wasn't until 1965 or 1966 that you went to Mr. Anderson and told him that you were going to pursue an independent course from Prudential, isn't that the truth?

A No.

Q Did you have a meeting with Mr. Willey, sir, at any time in 1965?

A In January I believe it was, January, 1965, Mr. Wright and Mr. Shippee and Mr.Willey all came to Bartlesville.

Q Subsequent to that, did you ever have a meeting with Mr. Willey alone?

A I don't remember such a meeting.

Q Mr. Willey has testified here sir, that he met with you subsequent to the January 1965 meeting and he showed you a memorandum summarizing what Prudential had done in connection with Phillips on this project. I show you Defendant's Exhibit 326 and ask you if that refreshes your recollection as to whether you had a meeting with Mr. Willey in which he told you what PHillips and Prudential had done on this project together?

A I don't remember his giving me this.

Q Do you recall a conversation with Mr. Willey in which he told you that Prudential had an interest in this plant in 1965?

A No, I don't remember Mr. Willey telling me that. It could have happened in the meeting in January, where they were there, but I really don't think Mr. Willey said a thing in that meeting.

Q Did you ever deny to Mr. Willey that Prudential had an interest in the project?

A I don't remember it, but I wouldhave if he had been at my office, I can assure you.

MR. MARKS: Your Honor, I have nothing further except for the one open matter that we discussed.

THE COURT: All right. In that case, I will excuse the jury at this time for a brief recess while I take up the open matters.

(Jury left the courtroom.)

THE COURT: Gentlemen, in order to rule meaningfully on this application concerning the privilege, the Court will need some additional information.

I have concluded tentatively that what I should do is to take the court reporter and the attorneys for the defendant into chambers, and make an inquiry of them on the record, which I would intend to seal, with the understanding that I will unseal it after this trial, if anyone is aggrieved by the ultimate ruling that I may make, and wishes to, or gets himself in any posture where he can obtain an appellate view of what the Court has done.

I don't know any other way to proceed. The Court cannot make an intelligent ruling on this issue of the privilege without some more information.

MR. MARKS: I just have one point, your Honor, and that is --

THE COURT: Before I go any further, I really think that most of the issues in this lawsuit would be amply satisfied by taking from this witness or from any knowledgeable witness what they were paid and what they did, what they in fact were paid and what they in fact did.

Go ahead, Mr. Marks.

MR. MARKS: The only thing we wanted to know, your Honor, was whether there is anything in that document concerning representations, and the second reason we wanted to inspect the document was --

THE COURT: You mean representations that nobody else had an interest in the project?

MR. MARKS: Or anything else like that, yes. I don't know anything about what's in that document, but I

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do know that Mr. Learned's prior testimony was that he couldn't recollect the agreement without looking at it and we never looked at it.

THE COURT: You can't deal with that problem without, I don't believe that I can deal with that problem without speaking with Mr. MacCrate and Mr. Jemison and Mr. Rigney ex parte, which I am prepared to do on the record. As I said to you earlier, depending on how I rule, anyone who has a legitimate basis for reading what is said, will have access to the record after the trial.

MR. FARRELL: That's satisfactory.

THE COURT: All right.

Step inside.

(Discussion in the robing room sealed, and not transcribed.)

MR. MARKS: May I have a brief point that I neglected to make earlier?

THE COURT: Yes.

MR. MARKS: Plaintiff's Exhibit 135 for identification is a draft of the retainer agreement.

THE COURT: May I see it?

MR. MARKS: Previously produced which is not executed. It seems to me that that item should be taken into account as well in considering whether Phillips waived any privilege with respect to this material. Also it is on the pretrial list.

MR. MacCRATE: Your Honor, this document that has been handed to you by Mr. Marks is the copy of the letter subsequently written by Mr. Parker of December 6, 1963 which was inadvertently furnished by defendant's counsel to plaintiff's counsel in the course of the duplication of documents that had been marked in discovery. When this inadvertence was discovered we requested the return of the document and it was refused.

THE COURT: Well, I don't think that is important for my immediate purposes because Exhibit 135 for identification is really irrelevant to this issue.

I am prepared to rule that a letter dated November 13, 1963 consisting of two pages signed by Mr.

Chapman and addressed to Learned, treated together with a letter dated October 21, 1965 which we discussed last night written by Mr. Chapman to Mr. Learned, as a single exhibit, must be produced.

In so far as the second letter which is referred to under the same date of November 13, 1963 it is mentioned in the first paragraph of Exhibit 135 for identification, I understand and correct me if I am wrong, Mr. MacCrate is prepared to represent to the Court and stipulate that he does not have possession of that document and that he also prepared to explain informally to you gentlemen representing the plaintiff about why he believes he doesn't have possession of it and I gather he is prepared to stipulate in the presence of the jury he doesn't have it.

And if you make an issue out of it I suppose he intends to tend his explanation to the jury through a winess.

MR. MacCRATE: That is correct.

THE COURT: And so I would permit him to proceed in that fashion. However, I believe, and I do not intrude on lawyers' trial tactics to any greater extent than I have to to keep the trial moving, I believe you are going to find it is a blind alley and accept his explanation and take the secondary evidence of the contents of the letter.

But maybe you will not and, if you will not, then I will take the stipulation on his part or statement on the record in open court that he doesn't have it and to rebut the inference that he suppressed or his client rather suppressed a damaging document, I will permit him to call a competent witness who can testify firsthand as to this explanation why they don't have it.

The balance of Court Exhibit 4 for identification I am sealing as being irrelevant or privileged, and I don't adhere to either particular basis too much.

Do I state it fairly and correctly?

MR. MacCRATE: You do, your Honor.

MR. JEMISON: Absolutely.

THE COURT: So why don't you all put your heads together and you may find this a tempest in a teapot, but you may not and if you want to make known the fact of the second letter of November 13, 1963 isn't available and put the defense to their proof as to why it isn't, then you may do that.

MR. FARRELL: All right, your Honor.

(Discussion off the record.)

(In open court.)

THE COURT: Shall we go on the record, gentlemen?

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MR. JEMISON: Your Honor, I may advise the Court at this time that counsel for the plaintiff and counsel for the defendant have stipulated and agreed that there will be no reference to the absence of this second letter discussed with your Honor just a few minutes ago in chambers and in lieu or in exchange for this stipulation, the defendant Phillips agrees not to call Mr. Martin Friedman who is listed as a witness in the pretrial order.

MR. FARRELL: That is satisfactory.

THE COURT: So stipulated and ordered. No reference is to be made to the fact that it is not available.

Let us bring in the jury and Mr. Learned.

(Jury present.)

STANLEY LEARNED, resumed.

BY MR. MARKS:

Q Mr. Learned, I show you this picture of the company plant and ask you if you can identify this picture as appearing in the Phillips annual report for 1967, Plaintiff's Exhibit 236 for identification on page 15 as being the plant that was erected by Phillips in Puerto Rico?

A That shows a portion of the plant. It doesn't show the whole plant but it is a very good picture of the portion it shows.

MR. MARKS: I would offer that, your Honor.

THE COURT: All right. Wait until they finish opening their package.

MR. MacCRATE: We will be happy to volunteer (exhibiting pictures).

THE COURT: So the record may be complete am I to understand that these are blowups of the exhibit that you have there?

MR. MacCRATE: They actually, your Honor, are pictures that show, one shows the harbor where the vessels bring in and take out the product and the entire core facility of Phillips Puerto Rico Core.

And the other picture shows the core area and across a field the fibers operation that has been referred to in the testimony.

THE COURT: All these pictures may be marked and received in evidence.

Have you finished the cross-examination?

MR. MARKS: Yes, your Honor.

THE COURT: Is there any redirect examination?

MR. MacCRATE: No your Honor.

THE COURT: You are excused, sir.

(Witness excused.)

(Plaintiff's Exhibits 236, 237 and 238 were received in evidence.)

MR. JEMISON: Your Honor, the defendant will call as its next witness Mr. Leo Johnstone.

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LEO H. JOHNSTONE, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JEMISON:

Q Mr. Johnstone, are you employed by Phillips Petroleum Company?

A Yes, I am.

Q What is your present position?

A I am executive vice-president of Phillips in charge of our chemical operations; also a member of the board of directors.

Q What was your position with Phillips in July of 1965?

A In July of 1965 my assignment became director of Puerto Rico Chemicals. This was a division of the chemical department.

My assignment was to implement the development of satellites for the petrochemical operation in Puerto

Rico in the spirit of the agreement of May 27, 1965.

Q What size staff did you assemble to assist you in this matter?

A Over the first few months I assembled a staff of approximately eight or ten people.

Q Did you and your staff endeavor to interest third parties in developing satellite plants with respect to the petrochemical facility?

A We certainly did. During the first year of that activity we were in contact with over 100 different companies, contacts in one way or another, either in person or correspondence or telephone.

Q How long thereafter did Phillips endeavor to interest third parties in satellites?

A That position and that division of the chemical department existed with a definite organizawtional thrust until about two years ago.

We continued to keep satellites in mind and we continued to develop satellites. As a matter of fact, we have one satellite operation under construction at this time.

a.m.

Q Is that particular satellite operation a hundred percent owned Phillips?

A Yes, it is.

Q Aside from that satellite which you mentioned, has there been any satellites developed with respect to the petrochemical facility?

A The only other satellite is a fibers operation which was developed to produce nylon fiber, and later produced polyester fiber, and this was done in parternship with Rhone-Poulenc, the French fiber and chemical company, who owned twenty percent of it.

Q Would you tell us, was Rhone-Poulenc the possessor of certain technical knowledge?

A Rhone-Poulenc is one of the largest industrial concerns in France.

THE COURT: Can't you just answer that yes or no?

A Yes.

Q Will you explain the technical information in their possession?

A They were pioneers in the development of synthetic fibers. They supplied technology to other companies, including duPont.

MR. JEMISON: Your Honor, I will not at this time read Joint Exhibit 71 to the jury.

(Mr. Jemison read from Joint Exhibit 71 in evidence to the jury.)

Q Mr. Johnstone, aside from the nylon plant that you have referred to, was Phillips ever successful in encouraging or inducing any third party to build a satellite plant in Puerto Rico?

A No, sir.

Q Would you describe what the principal reasons were with respect to the unwillingness of third parties to invest in satellites in Puerto Rico?

A There were a number of, I'd say three principal stated reasons.

MR. MARKS: May we have what companies we are talking about?

THE COURT: He said there were a hundred he saw. I will take his opinion as to why he failed, but I don't want to take hearsay from some anonymous corporations of what they told him.

MR. JEMISON: I'm just asking for this man's experience.

THE COURT: If he has an opinion about why he wasn't successful, I will permit him to give it in that context, but not telling us what some faceless company said.

MR. JEMISON: No, your Honor.

A In general, there was concern among the companies that we were in contact with on installing chemical operations in large scale in Puerto Rico because of its distance from the markets.

Secondly, there was some concern about being tied to a single source of supply of raw materials, that is, the Phillips Puerto Rico Core petrochemical complex would be the only source of raw material.

And thirdly, there was a number of attempts made to get reduced prices on raw material whereas we insisted on selling at the market price.

Q In other words, with respect to your last statement, person whom you contacted, corporations whom you contacted were unwilling to pay the market price for those products?

A That's right.

Q Mr. Johnstone, what was the capital investment in the fiber satellite as of January 1, 1968?

MR. MARKS: I object to that, your Honor.

THE COURT: Didn't we already receive that the other day?

MR. JEMISON: There's been no specific testimony with respect to the investment as of January 1, 1968, your Honor.

THE COURT: I will overrule the objection.

A The investment in plant equipment at that time was approximately $36,000,000.

THE COURT: January 1, 1968?

THE WITNES: Yes.

Q Mr. Johnstone, did Phillips intend for the fiber operation to be profitable?

A We certainly did. In a presentation --

THE COURT: All right, you can answer that "Yes." I think nobody is going to argue over that. Nobody goes into business not intending to make a profit.

Let's go forward, please.

Q Mr. Johnstone, what was the capital investment in a core petrochemical facility as of January 1, 1968?

A Approximately $68,000,000.

Q Mr. Johnstone, did you ever have a meeting with Mr. Nathan Shippee?

A Yes, I had meetings, two meetings with him.

Q State, if you would, when and where the first meeting occurred.

A The first meeting occurred in New York City, in his office, on January 24th, I believe, of1966.

Q What caused you to meet with Mr. Shippee in January of 1966?

A He had written to Mr. Learned and to Mr. Waldby, stating that he was interested in pursuing an operation in Puerto Rico. This matter was referred to me. I corresponded with him late in 1965 and established an appointment with him later by telephone and we met, I believe, on January 24th.

Q Did you do so in your role as the person responsible for the development of satellites?

A Yes, sir.

Q Did you make a memorandum of that meeting shortly after the meeting?

A Yes, I did.

MR. JEMISON: Your Honor, I will offer and read to the jury, Plaintiff's Exhibit 187.

MR. MARKS: I object to that, your Honor. May we approach the side bar?

THE COURT: You may approach the side bar. I will have to get ahold of my copy of it. Would one of you lend me a copy for the discussion?

(At the side bar.)

THE COURT: You see, ordinarily I would sustain the objection without even requiring a side bar conference, because there's been no showing that his recollection is exhausted. Is there something else that I don't know about?

MR. MARKS: No. The only other point I was going to make, that is clearly a self-serving document.

THE COURT: He can use it to refresh his recollection, once it is established that he's told all he remembers.

MR. JEMISON: Your Honor, I would expect to establish through this witness that it is admissible as past recollection recorded.

THE COURT: Well, you have the best evidence available which is the witness himself. If he can't remember what he said or did, then he may have reference to the document.

If the document fails to refresh his recollection, then I would take it as past recollection recorded.

MR. JEMISON: That would be the procedure.

THE COURT: You will have to make a foundation.

MR. JEMISON: Okay. I had thought that your Honor has ruled that all of the documents that are listed, as this is a document that was listed by the plaintiff as one which they intended to offer into evidence, and I thought --

THE COURT: They could offer it because it would be an admission against interest by the person making it and within that exception of the hearsay rule. All I really held, or what I think I held on the record was that documents listed in the pretrial order are all genuine and if they say on them that they were sent to Mr. So and So, it wasn't necessary to waste time asking Mr. So and So did he receive it. But a document may be admissible at the instance of one party and not necessarily admissible at the instance of the other party, because as to them, they can treat it as an admission of an agent of Phillips.

MR. JEMISON: Okay. I simply misunderstood your Honor's ruling on that.

THE COURT: All right. Maybe I didn't make it clear.

(In open court.)

Q Mr. Johnstone, I hand you what has been marked --

THE COURT: Wait a minute now. You have to exhaust his recollection before you can show him anything.

MR. JEMISON: Yes.

Q Mr. Johnstone, would you please tell the Court and jury what you recall of your meeting with Mr. Shippee in January of 1966?

A Yes. I went to Mr. Shippee's office on that day and met him for the first time, although we had talked over the telephone.

He showed me a letter dated in November, 1962, signed by STanley Learned, which had to do with the possibility of Prudential obtaining an import quota.

He told me that they had applied for this import quota and as events developed, the scope of the total project became too large for Prudential and therefore they had stepped aside in favor of Phillips, and that it was now time for Phillips to return the favor.

I asked him what he had in mind. He told me that in general that he would like to, for his company, participate in a satellite operation in Puerto Rico, that we could designate the particular chemical that we wishedto be produced, that they would contract to buy the raw material from Core, but that Core would contract to buy the product from the plant and that Phillips would assist with engineering, construction and operation of the plant.

I told him that this appeared to me to be simply a financing approach as opposed to bringing in any particular expertise such as technology or marketing of chemicals to the table and I didn't really understand the arithmetic, but that it sounded to me that, in effect, Phillips or Core would guarantee a pay out of the plant whereby Prudential would take no market risk, and that, as a part of his approach, Phillips or Core would have the option to buy the plant in say five or six years.

I said, well, it sounds like then that we would, in effect, pay for the plant twice, and that it didn't sound very good to me, but that there may be some companies who would like to finance on that basis.

As I recall, I specifically mentioned the possibility of some textile operations that might be attracted to Puerto Rico as a result of the synthetic fiber operation there, and that I would keep that in mind if that came up.

That is essentially what I remember.

Q Mr. Johnstone, let me hand you Plaintiff's Exhibit 187 and ask you to look at that please and see whether it refreshes your recollection as to any other matters?

A Yes, it appears that there is one matter that I did remember. He did mention their specific interest would be an investment some place in the range of 6 to 8 million dollars.

Q Did you agree or mention at that meeting that you would meet with him again?

A Yes, I did. I told him that I would be interested in really learning more about what he had in mind. I didn't feel at the time that I should cut off communications and I should find out more about it.

MR. JEMISON: I will offer again Plaintiff's Exhibit 187 into evidence on the basis --

MR. MARKS: I object on the same ground.

THE COURT: I will sustain the objection.

Q Mr. Johnstone, did you have another meeting with Mr. Shippee thereafter?

A Yes. I met with Mr. Shippee and some of his associates, I believe it was on February 17, approximately three weeks after the first meeting.

Q Will you describe what was said at this meeting?

A Well, this particular meeting he handed me a document. As I recall the title of it was "Arithmetic of Proposed Satellite Chemical Operation", in which he enumerated the conditions that they would like in he development of a satellite in Puerto Rico.

Those terms were essentially as I described a few minutes ago. I believe the number in that was 7-1/2 million dollars.

Q Mr. Johnstone, I hand you what has been marked as Plaintiff's Exhibit 187 and ask you to identify that document.

Is that the cocument that Mr. Shippee handed to you?

THE COURT: Is 187 a document Mr. Shippee handed him?

MR. JEMISON: Yes, unless I have gotten the wrong number.

THE COURT: I'm afraid you might have or one of us did.

MR. JEMISON: Let me check with Mr. Rigney, your Honor.

THE COURT: All right.

(Pause.)

MR. JEMISON: Your Honor, I was mistaken. It is Plaintiff's Exhibit 189.

Q For the record, Mr. Johnstone, is this a copy of the document handed to you by Mr. Shippee at this 1966 meeting?

A Yes.

MR. JEMISON: Your Honor, at this time I will read Plaintiff's Exhibit 189.

THE COURT: All right.

(Exhibit read.)

Q Mr. Johnstone, in either of these two meetings that you had with Mr. Shippee, did Mr. Shippee or anyone with him ever complain about Phillips using any idea or concept that he had originated?

MR. MARKS: I object to the form.

THE COURT: All right. I will sustain the objection as to form.

Substitute another word for the word complain.

Q Did Mr. Shippee in your meeting in January 1966 ever object or register any objection --

THE COURT: Let's find out what he said and the jury will ascertain whether that is a complaint or not.

Q What did Mr. Shippee say with respect to Phillips using any ideas that he had originated?

A He said nothing with regard to using ideas that he had originated.

I believe I stated earlier that he told me that they had applied for an import quota and stepped aside when the project apparently became too large for them. But aside from that and the statement that they had done Phillips a favor and now it was time for Phillips to return the favor, I believe this was the extent of the conversation, although that was repeated several times.

Q Is your answer the same or different with respect to your February 1966 meeting?

A The same.

MR. JEMISON: I have no further questions of this witness.

CROSS EXAMINATION

X BY MR. MARKS:

Q Mr. Johnstone, are you familiar with the Phillips obligations under its agreement with the Commonwealth of Puerto Rico?

A In general, yes.

Q Were you working in connection with satellite plants for that operation?

A Yes.

Q To carry out Phillips' obligations under the agreement?

A Right.

Q Can you tell me what Phillips did to carry out its obligations under that agreement with regard to satellites?

A Well, first of all the agreement statement that we would invest a minimum of $55 million of a total of the profits for ten years, whichever is greater.

That we would invest --

Q Let me stop you at that point.

Do you know what investment Phillips has made with regard to the profits?

THE COURT: I don't know if he finished his answer before.

MR. MARKS: I am sorry.

A The remainder of the answer had to do more with the timing of some initial investments that we were to invest or commence construction or authorize expenditure of about $10 million within six months and, I believe, $30 million within 21 months.

Q Can you tell me what Phillips did with regard to its investment obligation?

A Although I don't have the specific numbers, we invested well over $100 million in the fibers operation.

We are in the process of investing close to $75 million in another satellite operation to produce paraxylene.

Q Is that the one you refer to in your direct examination, under construction now?

A Under construction, that is right.

Q That investment is pursuant to your obligations under the agreement with the Commonwealth?

A Yes.

Q In other words, you are still today carrying out the terms of the agreement back in 11965?

A Yes.

Q With regard to the investment and with regard to the reinvestment of profits?

A Yes.

MR. MARKS: Perhaps I better approach the side bar in view of our prior conversation. I don't want to go into an area that may cause a problem.

(At the side bar.)

MR. MARKS: They clearly opened the door with respect to the reinvestment of profits. The 1973 and 1974 financial statements show that in 1973 after the quota expired Phillips still made $35 million in the core plant and in 1974 I believe the figure show they made in excess of $30 million after the core quote expired.

In view of the witness' testimony about the reinvestment of profits I think I am entitled to inquire of the amount of profits they were reinvesting. It is clearly relevant on direct and cross.

MR. MacCRATE: What is the relevance of this whole inquiry as to what is going on in 1976?

MR. MARKS: They raised it on direct examination and asked whether he was carrying out the obligations under the 1965 agreement.

THE COURT: I must say the significance of the direct examination escaped me. Whatever the profits were for ten years they were obligated to plow them back.

MR. MARKS: But it is relevant what they were.

THE COURT: Well, you don't need to prove it by cross-examination of this witness. I will have to review his direct examination and make a ruling. I will have the reporter read it back at some proper time or I will look at it at tomorrow morning's transcript.

I don't understand the significance of the direct examination. The Court would assume in the absence of any proof to the contrary that this comany was honoring its obligations.

I think I will let the jury go for lunch at this time. There is no reason to hold them.

Do you have more cross-examination?

MR. MARKS: About 15 minutes if you would like me to complete it.

THE COURT: All right, you complete it and then we will discuss this further. You don't need the witness for this, whether they opened the door is another question.

MR. JEMISON: Your Honor --

THE COURT: The Court will assume they were complying with the law as far as the Commonwealth is concerned and if they weren't complying the Commonwealth had ample basis to make them comply.

MR. JEMISON: Perhaps it is significant for your Honor's ruling on this matter because this is the witness who would testify with respect to the fibers operation, which is, as you recall from this joint exhibit an integral part of our obligation.

(In open court.)

THE COURT: Members of the jury, return at ten minutes of two. We will break for lunch now and please return at ten minutes of two.

(Jury left the courtroom.)

THE COURT: You may step down, Mr. Johnston.

(The witness left the stand.)

MR. MARKS: The point is they can't have it both ways. They can't elicit from this witness testimony about the fibers plant investment and $100 million, which they did, read into the record a document concerning their investment in the fibers plant and ask the witness about what they are investing in satellites today and ask whether they are complying with their agreement and then prevent me from bringing out the fact as to what those profits were that they are obligated to reinvest.

(Continued on next page.)

MR. MacCRATE: The plaintiff has taken the position, through presentation of expert testimony, that they are entitled to have damages fixed by reference to the situation in January of 1968. While questioning the correctness of that position, this is the record that has been made by the plaintiff on its case and we are directing ourselves, your Honor, to what were the investments as of January 1968, and it is direct rebuttal to the testimony of the experts.

THE COURT: What was the purpose of bringing out investments made after 1968 in the direct examination? You see, I don't like to spend the entire time in this trial urging the attorneys to hurry up. I don't think that is fair to you. But I sit here and I take proof which bears no rational connection that I can see with this case and I don't stop anybody from putting it in, and there is no objection, and then lo and behold on cross exmination they say you have opened the door and then I have to hear more proof on cross examination.

It seems to me every litigant here and the jury would be entitled to assume that Phillips complied one hundred percent with its obligations under the agreement with the P.E.A., that whatever profits they booked in their core plant they re=invested in Puerto Rico and couldn't take them out over a ten year period and had them tax-free during that period, and we have had all that, and now it's brought out on direct examination of what they are doing, and what numbers they put into this thing.

Of course, it's obvious the money had to represent either present or anticipated profits of the core plant, isn't that so?

MR. MacCRATE: Well, the magnitude of this investment, your Honor, and what was done went beyond the obligation right prior to this time in 1968 and if anyone is going to take a look at what is the value of the expectation, to look at just what has been undertaken here and what has been done by Phillips --

THE COURT: I think it is reasonable cross examination to elicit from this witness the fact that these investments were made out of the profits of the core plant or in furtherance or compliance with the obligation to re-invest present profits and expected profits during the ten-year period.

It is clear to me at some point there Phillips had invested more money than they were obligated under the agreement. Isn't that so?

MR. MacCRATE: Very definitely. They were way ahead.

THE COURT: And then since they are making additional investments a juror could conclude either that they caught up with their profits or that they anticipated they would catch up before the ten year period expired and I really thing that you have opened the door to this question of the profits or anticipated profits during the ten year period being elicited.

MR. MacCRATE: Your HOnor, what were the profits during the period has nothing to do with the value in 1968. That is the issue. And the question of what has gone into this enterprise as of 1968 is germane, that is if you are going to look at that time, what are the facts at which you can look.

THE COURT: The fact that it came from impounded funds or impounded profits, if you will, is also germane.

MR. MacCRATE: But it is the status in 1968 that determines, and all this hindsight is irrelevant.

THE COURT: So why was it brought out? That's what puzzles me. Once it is brought out I think the whole picture can come out. Perhaps I have to review the transcript to see exactly what was brought out, but it looks to me as if you have tendered the issue to this jury of expenses made after '68 and that would enable the plaintiff to show that this money came from impounded profits, either impounded profits or anticipated impounded profits as to which he was accruing a set of for use in the future.

MR.MacCRATE: The only investment figures that I recall that were given with respect to 1968 but I defer to Mr. Jemison who is conducting the examination.

THE COURT: Well, I will have to review the transcript if you don't agree on what was covered.

MR. JEMISON: That is correct what Mr. MacCrate has said. The only reference to a satellite plant now under contruction was directed to an inquiry as to what had been your success with respect to inducing the development of satellites in connection with this plant.

It was not offered to show either the amount -- the record at this stage, I believe, your Honor, it could be assumed it could range from one dollar on up.

THE COURT: He's presently employed by Phillips, isn't he?

MR. JEMISON: Yes,he is.

THE COURT: All right. I'm going to ask him to stand by and when I get the transcript I will rule on whether you have opened the door.

All right. He may be recalled if the Court concludes that you opened the door.

MR. MARKS: I have additional cross for him.

THE COURT: Apart from that issue?

MR. MARKS: Yes.

THE COURT: After lunch.

MR. MacCRATE: Your Honor, I am unclear as to what is the position of the plaintiff with respect to Mr. Chapman? Mr. Chapman's partner remains with us --

THE COURT: Well let me discuss that with counsel informally, and let Mr. Chapman's partner stand by for just a few minutes.

(Discussion in the robing room, off the record.)

(In open court.)

MR. MARKS: At the suggestion of counsel for both sides, I have spoken to Mr. Lenzini, who is Mr. Chapman's law parnter, present in the courtroom today. Mr. Lenzini has presented me with a letter dated January 19, 1976 from Dr. Oler concerning Mr. Chapman's health and he has reviewed with me Mr. Chapman's working habits. Although Mr. Chapman has been in the office working, I believe five days in January, he has been out other periods of time, and the doctors indicate that he should not be working under these conditions.

Mr. Lenzini further advises me that Mr. Chapman does not have an active law practice although he comes to the office and does sit on I believe two boards of directors, of things that he is interested in.

I believe one is a botanical gardens organization that meet infrequently. Under these circumsntaces, and the representations made to me by Mr. Lenzini, I believe that the plaintiffs will not demand a deposition of Mr. Chapman at this time.

THE COURT: All right.

MR. MacCRATE: May the doctors certificate be marked for identification?

THE COURT: Yes, mark it as a Court's exhibit, 5, for identification.

(Court's Exhibit 5 marked.)

THE COURT: I take it therefore there will be no need to conduct an evidentiary hearing?

MR. MARKS: I see no necessity for that. I'm satisfied with the representations.

THE COURT: Then it is understood that those persons wishing to offer the interrogatories can do so if they wish to.

All right. Is Mr. Lenzini needed for any purpose?

MR. MARKS: No, not so far as the plaintiff is concerned.

THE COURT: Do you need him, Mr. MacCrate?

MR. MacCRATE: No, your Honor.

THE COURT: Mr. Lenzini would you note your full name for the record, then I will excuse you.

MR. LENZINI: Paul A. Lenzini.

THE COURT: You are a member of the Chapman law firm?

MR. LENZINI: I am.

THE COURT: Thank you for attending here today. You are excused.

We will be in recess until ten minutes of 2.

(Luncheon recess.)

AFTERNOON SESSION

2 p.m.

L. H. JOHNSTONE, resumed.

(In open court - jury present.)

THE COURT: Good afternoon, members of the jury.

CROSS EXAMINATION

BY MR. MARKS CONTINUED:

Q Did I understand, Mr. Johnstone, your direct testimony to be that Phillips reinvested all of the profits from the core plant in the satellites that were put up?

A Well, as a matter of fact, we have invested in anticipation of the profits.

THE COURT: You're telling us by that that you have invested more than the profits to date?

THE WITNESS: Yes, sir

Q Well, how much have you invested?

A Our investment in the fibers operation, including working capital and losses, have been $167,000,000.

THE COURT: Do you count losses as an investment under your contract?

THE WITNESS: Yes, we were counting them.

Q What would have been the profits to date from the core plant facility?

A The profits through 1975 -- now this includes an estimate for the last two months of 1975 -- are approximately $108,000,000.

Q $108,000,000?

A 108.

Q In other words, Phillips has had net earnings from the core plant that we have been talking about from 1967 until 1975, Phillips has made $108,000,000 on that net, from the earnings of the core plant?

A That is the financial earnings, yes.

Q What is the remaining approximate life of the core plant?

THE COURT: You mean the life of the import quota for the agreement?

MR. MARKS: The life of the core plant.

Q How much longer is this core refinery going to remain in existence approximately; another fifteen years.

A I don't believe I can answer the question.

THE COURT: It depends on how much you spend on repairs, isn't that so?

THE WITNESS: Well, it depends also on certain economic conditions.

THE COURT: He's talking about existence.

THE WITNESS: Well, you're talking just about physical existence without it rusting down, yes--

THE COURT: It could last forever.

THE WITNESS: Yes.

Q Haven't you taken into account anticipated profits that Phillips is going to make on the core plant in the next ten years?

A Our investment thinking has been trying to estimate profits through 1979.

Q What do you estimate those to be?

A Well, we have ranges but --

Q Give us a range.

A With the 108,000,000 through 1975 we believe that some estimate for the remaining four years would be in the range of 10 to 15 million dollars a year.

Q Additional profits?

A Yes.

Q So that for another four years you would have, Phillips would make another 40 to 60 million dollars on this plant, is that correct?

A I'd like to qualify that if I may.

Q Would they make earnings on --

THE COURT: Look, you asked him twice. Let him answer. He wanted to qualify his answer. You see, he gave you all these figures and now you want to ask him the same question over again. Let him answer.

MR. MARKS: I will let him answer. I just want to be clear.

Go ahead.

A When we started out with Core, we had --

THE COURT: Please, don't give us a speech. If you want to qualify your answer, I'm letting you do it.

A Let me say it this way, then:

That the world price of petroleum, the priceof petroleum outside the United States has gone up very rapidly, more so than in the United States, which can make it difficult for Core to make a profit through selling its products in the United States.

Q Are you selling it elsewhere?

A Partly, but mostly in the United States.

Q But you are making money on it?

A We are now.

Q And you plan to make money on it, you project you are going to make money on it for another four years?

A We hope we will.

Q So from this core plant that we have talked about in this case, from the beginning, Phillips is going to make $160,000,000, isn't that right?

THE COURT: Look, I don't have unlimited time. No more summations. The jury can add 108 and they can add the 10 and 15 and you can do it in summation. No more repetition. I will let this question go by, but conduct your examination more expeditiously.

Q This is one of the most valuable core plants that Phillips has ever constructed, isn't that the truth?

A I don't know that I can answer that it is the most valuable core plant. It is the only plant of its type that Phillips has built, so therefore it is the most valuable.

Q Now, with regard to the investment in the fiber business that you testified Phillips made, there was no obligation on Phillips to invest in the fiber business, was there?

THE COURT: We all know that. Ask another question. You're wasting my time. The answer to that question is yes, there was no obligation. Now go on with this trial.

Q Isn't it a fact, Mr. Johnstone, that Phillips took its own calculated risk that it would lose money when Phillips chose to go into the fiber business as opposed to some other satellite that it could have chosen?

THE COURT: Mr. Marks, I won't allow that question. It is repetitious and unnecessary and argumentative. I will give you ten minutes to conclude with this witness.

Q Didn't you know, Mr. Johnstone, that is, didn't Phillips know, prior to making the investment in the fiber plant, that it was going to be unprofitable?

A No, sir.

Q Are you aware of the fact that Mr. Learned testified at pretrial deposition that the reason --

MR. JEMISON: Your Honor, I object.

THE COURT: I will sustain the objection.

Mr. Learned's testimony may not be used to impeach this witness.

Q I show you Mr. Learned's testimony --

THE COURT: I won't permit that, Mr. Marks.

Sit down. No more.

MR. MARKS: It is just for the purpose, I'm going to ask if this refreshes his recollection.

THE COURT: I won't permit it. That is doing indirectly what you can't do directly. I won't permit it. Ask him another question about his direct testimony.

This is cross examination here and I'm going to limit it. I've got to get through with this trial.

MR. MARKS: I think this is relevant, Judge.

THE COURT: I don't.

Q Did Phillips make studies prior to going into the fiber business which indicated thatthe fiber business was going to be unprofitable for Phillips at least in the early years of its operations?

A There were studies made. I don't recall the year by year economics. All I recall are the overall economics which I think I indicated this morning were something like a 12.4 percent rate of return.

Q Isn't it a fact, sir, that Phillips chose to break into the fibers business in Puerto Rico knowing that it was going to have losses in the early years of its operations and chose to do it anyhow for Phillips' own purposes?

A I don't know that I understand the question, because we anticipated going into the fibers business, breaking into the fibers business, as you put it, but we intended that that business be profitable.

Q But you made a bad judgment, is that what happened?

A We either made a bad judgment or, I think you would have to say that, because conditions changed, a lot of things change.

Q Phillips just made a mistake when it went in there, isn't that right?

A I think you wouldhave to conclude that since we lost money.

Q That is not Prudential's problem, is it, Mr. Johnstone?

MR. JEMISON: Objection.

THE COURT: No more of that. Objection sustained. I cannot have these argumentative questions, Mr. Marks. You have got to stop it.

Q Directing your attention to your meeting with Mr. Shippee that you have testified about earlier, that took place in January, 1966, I believe, late in January, 1966 --

A Yes, yes.

Q Now, isn't it a fact, Mr. Johnstone, that this meeting, Mr. Shippee told you that Phillips owed an obligation to Prudential?

A I don't recall that language. I recall him saying that Prudential did Phillips a favor and now it is Phillips' turn to do Prudential a favor.

Q Didn't you report to your management that Prudential was of the view that Phillips had an obligation to Prudential?

A I interpreted from what he said that he was implying an obligation.

Q He wasn't just saying he wanted something for nothing. He said we did things that -- Phillips benefitted from work that we did in connection with this oil import quota and now we want to be paid, or words or substance to that effect, isn't that what you understood his message to be?

A I was afraid that is what I was hearing, yes.

Q That is what you understood it was, wasn't it? Is that correct?

A That's what I understood that he might be representing.

Q And he even put a dollar figure on what he told you he felt that was owed to Prudential back in 1966, didn't he, a figure in the range of 6 to 8 million dollars, isnt' that what he said he wanted?

A He said that he wanted for us to pick out an operation, invest I think later $6,000,000, which would be paid out over a period of five years and then we purchase the plant.

Q In other words that Prudential would wind up getting 6 to 8 million dollars, is that right?

A That's right.

Q And that would be paid by Phillips, that is what he told you?

A Yes.

Q And this is before any lawsuit started in this case, isn't that right?

A That's right.

Q And then, Mr. Johnstone, didn't Mr. Shippee describe the work that Prudential had done and show you a letter that Mr. Learned had written to them?

A He showed me a letter that Mr. Learned had written to him which simply said that if Prudential got an import quota Phillips would be willing to discuss the supply of crude oil and the purchase of products from a refinery that Prudential might build. Now --

Q Didn't the letter also say that Phillips was going to counsel and assist Prudential in the erection and the management of the petrochemical complex in Puerto Rico?

A I believe it did.

Q Didn't Mr. Shippee also describe to you other work that Prudential had done in connection with Phillips including the name of Dr. Fischbeck?

A I don't recall his describing that to me, no.

Q Wasn't there a discussion at this meeting, sir about the value of an oil import quota, at the time of the meeting, being about $1.25 a barrel?

A Yes, one of the gentlemen in the meeting made some reference at one point.

Q To the value of the oil import quota at the time of your meeting?

A At the time of the meeting.

Q It was worth to Phillips $1.25 per barrel per day, is that right?

A He said that, yes.

Q That would be something like $18,000,000 a year or in that kind of vicinity for a 50,000 barrel a day refinery in Puerto Rico, is that correct?

MR. JEMISON: I object to counsel asking the witness to perform mechanical calculations.

THE COURT: I will sustain it for a different ground. It's repetitious.

Q Didn't you communicate a memorandum to Mr. Learned concerning this meeting that you had had with Mr. [illegible]pee?

A Yes.

Q Didn't you say on your memorandum to Mr. Learned that he should read your memorandum and then destroy it; did you say that?

A I said that.

MR. MARKS: No further questions.

MR. JEMISON: Your Honor, there is evidence of what this witness --

THE COURT: You will have a chance for redirect when Mr. Marks finishes.

REDIRECT EXAMINATION

BY MR. JEMISON:

Q Mr. Johnstone, would you please identify Plaintiff's Exhibit 187?

A Yes.

Q Is that the memorandum that you wrote shortly after your first meeting with Mr. Shippee?

A Yes, it is.

Q Is this the document which says "Please read and destroy?"

A Yes.

MR. JEMISON: I again move and offer it into evidence.

MR. MARKS: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 187 for identification was received in evidence.)

Q Mr. Johnstone, would you please tell us what has happened with respect to the investment in the fibers plant?

A Well, our total losses there have been about $167 million. That plant was shut down approximately a year ago and we have been endeavoring to sell the operation.

We believe that we may have a buyer and, if so, we will know this within a month. We should realize about $34 million from that investment. So our net loss then would be some place in the range of $135 million.

Q Subtracting by my calculation, Mr. Johnstone, the $110 million approximate profit in core and the $135 million from the loss in fibers, the net loss in Puerto Rico is $25 million?

MR. MARKS: I object, your Honor. Prudential wasn't supposed to have anything to do with the fibers plant.

THE COURT: I will sustain it but not on that ground, it is repetitious. All attorneys in this case will stop repeating things. The comments I made to Mr. Marks have to apply to you, Mr. Jemison.

MR. JEMISON: Very well.

(Defendant's Exhibit 339 was marked for identification.)

MR. MARKS: May we approach the side bar?

THE COURT: Yes.

(At the side bar.)

MR. JEMISON: Your Honor, Defendant's Exhibit 339 which I have handed to you has a calculation on the next page of the anticipated profits of Phillips Petroleum Company at the time it entered into the fibers operation.

Ordinarily I would have thought the document was totally irrelevant but since an issue has been made as to what Phillips anticipated in the way of profit return at that time, I feel the document is relevant.

MR. MARKS: We have never seen it, your Honor. I understand Mr. Jemison just received it this morning.

THE COURT: Certainly you are entitled to look at it. It probably must be admitted. It just shows the vice of allowing the trial to go far afield. The fault lies equally with both sides.

MR. JEMISON: I have no intention of reading it to the jury at this time.

MR. MARKS: I object to it.

THE COURT: Look at it first and then object.

(In open court.)

THE COURT: Wait until they finish looking at the paper.

(Pause.)

MR. MARKS: No objection.

THE COURT: It will be received in evidence.

(Defendant's Exhibit 339 for identification was received in evidence.)

BY MR. JEMISON:

Q Mr. Johnstone, this is my last inquiry of you but would you please explain to the Court and jury a particular computerized process that was used to assist Phillips in determining whether to make the fibers investment?

A Yes. There was a --

THE COURT: I don't want to hear it. I don't care whether they used a computer, slide rules or looked at the stars. They are entitled to make their business decisions and we are going too far. I don't want to hear it, Mr. Jemison.

Go on to something else.

MR. JEMISON: I have no further questions.

THE COURT: Anything further of this witness?

MR. MARKS: No, your Honor.

THE COURT: You are excused, sir.

(Witness excused.)

THE COURT: Call the next witness.

MR. MacCRATE: Mr. R. M. Waldby.

- -

ROY M. WALDBY, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MacCRATE:

Q Mr. Waldby, what is your present position?

A I am manager of operations for the refining division of Phillips Petroleum Company.

Q Would you trace for us just very quickly your educational background?

A I went to grade school in Oklahoma, to high school in Oklahoma and I attented from-132 to 1937 what was then Oklahoma A & M and I graduated with a Bachelor of Science degree in chemical engineering.

Q Would you briefly trace your employment from that time?

A I started work with Phillips Petroleum Company in June of 1937. I worked for approximately four years as a chemist and chemical engineer, a portion of this time in the laboratory.

I then joined the process engineering group. My service was Interrupted for approximately three and a half years of Military Service, leaving for Military Service in early 1942 and returning to the Phillips Refinery where

I previously had been employed in late 1945.

I transferred from the processing engineering group of the Phillips Refinery near Borger, Texas in the middle of 1947 to the Sweeney Refinery which is about 60 miles south of Houston and served there as chief chemist beginning in 1947.

In 1954 I was appointed superintendent of the stock and shipping and laboratory departments and served in that capacity until the middle of 1963.

I 1963 I moved to work in New York as a member of the sales and development division of the international department of Phillips. I served in this capacity for approximately two years.

I went to Bartlesville, Oklahoma about nine months, serving as manager of the Puerto Rican operations. Early in 1966 I went to Puerto Rico to assume the position of president and chief executive officer of the newly formed company called Phillips Puerto Rico Core, Inc.

Q For what period did you remain with the Phillips Puerto Rico Core, Inc.?

A I was there for six years starting in 1966 and returning to Bartlesville, Oklahoma to my present position in about April of 1962.

Q Now jumping back, Mr. Waldby, to the middle of 1963 when you transferred, as I understood it, from the Sweeney Refinery to the International Division; that was here in New York?

A Yes, sir, it was, at 80 Broadway.

Q What type of assignment did you receive at that time?

A I was manager of redevelopment worldwide. That excluded the continental United States. It was for development of refining ventures and associated petrochemical ventures outside the United States.

Q During the year 1963, to what projects were you assigned?

A Certain of the projects were a lubricating oil blending project in Bogata, Colombia. I made two trips to Bogota in 1963 in that regard.

Q Leave out the number of trips, if you will, and identify the assignments.

A A Colombian lubricating oil blending plant.

To Dublin, Ireland, to negotiate with the Irish Coal Board with regard to sale of Monogas crude oil as fuel.

Trips to Chicago, talking with Mr. Smanis about the possibility of a Cyprus refinery. The entertaining and negotiating with German visitors regarding a German refinery.

Q Well, did you also have an assignment with respect to a Puerto Rican project?

A I did.

Q Now, how did that come about; can you tell us the circumstances?

A On or about August the 7th, Mr. Miller Conn, my superior and I should say that I reported to Mr. R. E. Elliot, who in turn reported to Mr. Conn, but Mr. Conn called me into his office for a visit which I understood from him to be with Oscar Chapman of Washington, D.C., and told me that we had an opportunity to obtain permission to bring in large quantities of feedstock, into Puerto Rico, if we could make better than fifty percent petrochemicals from them, and he asked me to apply myself to the problem as to how we could produce those volumes of petrochemicals.

Q Do you recall anything else that either Mr.Conn said or you said at that time?

THE COURT: What was the date of this again?

THE WITNESS: It was either the 7th or the 8th of August of 1963.

A The main thing that I recall Mr. Conn telling me was, "Don't let the seas be any barrier."

I could only interpret it, don't have any fetters on your thinking on what to do.

Q Mr. Waldby, did Mr. Conn give you any materials, any papers at that time?

A Yes, sir, he did. I'm not sure whether in his office or on the way out of his office, but in that time period, yes, sir.

Q I show you P-215. That is an exhibit at this trial; the black cover please disregard.

MR. MARKS: This is Exhibit P-215, Mr. MacCrate.

Q I show you now the original exhibit, Mr. Waldby, and ask you if that was usedin the materials given to you by Mr. Conn at that time in August of 1963.

A May I have a moment to examine it?

Q Yes.

A Yes, sir, to the best of my -- it is now my belief that this was among the materials given to me by Mr. Conn.

Q Did Mr. Conn tell you anything about the materials that he gave to you at that time?

MR. MARKS: I object to that. Let's just get the conversation; who said what. It is very important.

THE COURT: All right. Let's get the conversation. I will allow the question.

A Mr. Conn told me that the material which he gave me was to be treated confidential.

Q Did he say anything else about it that you can recall?

A Not to my recollection, no, sir.

Q Following your discussion with Mr. Conn, which you place on the 7th or 8th of August of 1963, what did you next do with respect to this assignment that Mr. Conn had given you?

A I refer to the study of a GErman refinery, for which I had some economics and material --

THE COURT: Can't we just talk about Puerto Rico here? I don't want to hear about a German refinery.

MR. MacCRATE: I believe this relates directly.

THE COURT: All right.

A Naphtha was at a very low price in this German refinery, and it had been my experience at the Sweeney refinery that --

Q Mr. Waldby, rather than go into all of the details of your mental operation, if you could just enumerate the things that you did for us.

A I made notes concerning material balances on various crude oils. I examined our crude library which included brief resumes of the characteristics of various crudes; and sought one which had a high naphtha content, and one in which the naphtha had a high naphthene plus aromatic content or the ability to produce aromatic chemicals from it.

I made notes concerning this. I made notes concerning the possible chlorination of the heavy ends, the asphalt ends of the crude oil, but discarded the idea as impractical.

But I prepared a material balance, using Algerian crude as an example, roughly predicting chemical yields from this naphtha and predicting the distillate and fuel oil yields from the balance.

Q During what period of time did this activity that you have just described take place?

A I believe in days of the week that I received the information either on Thursday or Friday. I worked Saturday and Sunday in the office and to the best of my recollection on about the 12th had a meeting with Mr. Miller Conn and with Dale Fischbeck.

Q Was anyone else present besides Mr. Conn and Mr. Fischbeck?

A There might have been. I don't remember others.

Q Will you tell us as best you can recall what you said, what Mr. Conn said, what Mr. Fischbeck said?

A I cannot give you verbatim descriptions of what was said. It was my opinion, from the material balances which I --

MR. MARKS: I object to that, your Honor.

THE COURT: Well, it is not responsive.

Q Did you state your opinion, Mr. Waldby, or can you give us the substance of what was said?

A The substance of what was said was that I could not find a way to make 50 per cent chemicals from crude oil but that I saw a possibility of making it from naphtha.

Q Did Mr. Conn say anything at this meeting that you can now recall?

A Mr. Conn, I believe, developed the Tri-Continental name and approach of producing naphtha in Algeria, shipping the naphtha to Puerto Rico and shipping the bottoms to various smaller refineries in Euorpe as a transportation savings.

Q Do you recall anything else that Mr. Conn said in the meeting?

A I recall that Mr. Conn admonished me to work on the refining portion of the project and for Mr. Fischbeck to handle the petrochemicals.

Q Did Mr. Fischbeck say anything?

A I don't recollect in the meeting, but immediately following the meeting, as we left Mr. Conn's office, I recall him saying two things.

One is that, "You are kicking a dead horse," and the other was that he would be traveling abroad and would not be able to work on the project for several weeks.

Q Well, what did you, Mr. Waldby, next do with respect to this project?

A I sought approval from Mr. Conn to go to Bartlesville in order to advise our management of two projects:

One, in advance of receipt of German visitors with regard to the German refinery and the other to describe the Tri-Continental concept of distilling crude in Algeria, taking the naphtha to Puerto Rico, taking the bottom product to European refineries.

Q Well, did you in Bartlesville, after August the 14th, have some meetings there?

A Yes, sir.

Q With whom?

A The date, to the best of my knowledge, was the 15th of August; I met with Mr. Paul Parker in his office.

Q Who else was present, if you recall?

A No one was present; I'm relatively certain that no one else was present.

Q Tell us as best you can what you said and what Mr. Parker said.

A I informed Mr. Parker that as regards the German refinery that the economics did not look favorable. We had not yet met the principal and our economics at that time were only preliminary, but they were not favorable.

Q Did you say anything with respect to the other project?

A Yes, sir, I described to him the Tri-Continental project, the possibility of making more than 50 per cent chemicals from naphth in Puerto Rico along with the other facets of the project.

Q How long did this discussion with Mr. Parker last?

A I should estimate from 45 minutes to an hour.

Q Do you have any further recollection of it or what took place thereafter?

A Mr. Parker asked me to come with him to Mr. W.W. Keeler's office, which was close by, and to give to Mr. Keeler the status of the projects with particular reference to the German projects since our visitors were calling on us in Bartlesville that weekend.

Q Did you thereafter have a discussion with Mr. Keller?

A I did, with Mr. Parker present.

Q Was anyone else present?

A At the latter part of the conversation -- and this was towards the end -- Mr. Tom Cubbage, vice-president of the chemical department, and accompanied by some other gentleman whose name I do not remember, came into the office.

Q Do you recall anything that you said at that time in that meeting?

THE COURT: Can't we stick with Puerto Rico on this inquiry?

Q With respect to the Tri-Continental program that you have referred to.

A I was quite enthusiastic about the --

Q What did you say, Mr. Waldby?

A I told Mr. Keeler that it was my belief that we could make a large volume of petrochemicals from naphtha if we brought naphth rather than crude oil into Puerto Rico and that we would have an advantage in European refining if we yielded only distillates and fuel oil there because they were in demand and naphtha was not.

I also told Mr. Keeler that this was only a concept and that a great deal of work would be required in order to examine it exhaustively.

Mr. Keeler at that time authorized me to take whatever number of people was necessary in order to work on the project.

Q Did you continue through August 1963 to work on the project?

A I did.

Q Did you limit your work to the refining aspects as Mr. Conn had indicated to you?

A No, sir, I did not. I worked on the entire project.

Q Were any Phillips personnel assigned to assist you?

A Yes, sir. The principal assistants were David Blaker and Richard Berger.

Q I show you, Mr. Waldby, Exhibit D-137 for identification and ask you if you can identify that document?

A Yes, sir, I can.

Q What is it?

A It is a notification of job assignment, dated August 19, 1963, which describes the work as a feasibility study of Algerian crude processing, including Puerto Rico petrochemical complex and European refineries with location, Algeria, Puerto Rico, Europe.

Q Did you receive acopy of that notification of job assignment, Mr. Waldby, at about the date it bears of August 19, 1963?

A I did.

MR. MacCRATE: I offer D-137 in evidence.

MR. MARKS: No objection.

THE COURT: Received.

(Exhibit D-137 was received in evidence.)

Q Did other persons work on this project during August and September 1963 in addition to Mr. Burger and Mr. Blaker?

A Yes, sir?

Q Can you describe the various peopoe that were involved by departments or in some other way?

A Members of -- I am sure I cannot remember all of them -- but members of the controller's department. I spoke to Mr. Hinkle who was the controller of the company in order to obtain the services of Mr. Akright.

Q Mr. Waldby, perhaps in lieu of laboriously recounting, I show you Defendant's Exhibit 139 --

MR. MARKS: May we approach the side bar?

THE COURT: Yes, please do.

(At the side bar.)

MR. MARKS: This exhibit as far as I can tell is just a list of names and with no indication of what they did and how long they did anything. I don't see what the relevance is and I object.

THE COURT: What is it offered to show?

MR. MacCRATE: It is offered to show the devotion of manpower to the development right from the outset of a new project by Phillips.

THE COURT: That is the Algerian project.

MR. MacCRATE: This is the Puerto Rican project, the way it was developed as a project within Phillips.

THE COURT: This witness began in August 7.

MR. MacCRATE: But I want to show the work actually done.

THE COURT: He may testify as to the number of people who were working with him and I will take it D-139.

Please expedite it.

(In open court.)

BY MR. MacCRATE:

Q Can you identify Defendant's Exhibit 139?

A Yes, sir, I can.

Q What is the document?

A The document lists a number of people who have contributed to the Algerian project in the past few weeks. This was evidently prepared in September of 1963.

Q Did you have a copy of that at or about the time it was prepared?

A I did, yes, sir.

MR. MacCRATE: I offer it in evidence.

MR. MARKS: I believe your Honor ruled on that.

THE COURT: I will take it merely to show the number of persons who worked at least some time in connection with the Algerian project.

Is that what it shows?

THE WITNESS: Yes, sir.

THE COURT: Just to show the number of people.

(Defendant's Exhibit 139 for identification was received in evidence.)

MR. MacCRATE: Also, your Honor, the seven departments that are enumerated.

THE COURT: All right, seven departments.

Q Mr. Waldby, did this project that you have described come to be identified within Phillips as the PEA project?

A Yes, sir.

THE COURT: We already heard that from Mr. Learned.

- - -

Q What was the size of the PEA project in your initial analysis?

A It involved the receipt of 300 barrels per day of Algerian crude, the shipment of 100,000 barrels a day of naphtha to Puerto Rico and the balance of something less than 200,000 barrels a day to five identical refineries in Europe.

Q Did you have a feasibility study prepared with respect to the project of that size?

A I did have.

Q When approximately was that feasibility study completed?

A On or about September 5th.

Q What were the conclusions that you reached?

A The conclusions that were reached were that the investment was much more than Phillips wished to engage in at that time. It was a figure of approximately $360 million without regard to money spent on marketin investment.

There was another problem and that was that --

THE COURT: Couldn't we just cut this down? Did the study show it was not feasible?

THE WITNESS: At that volume, yes, sir.

THE COURT: Let's go on to something else.

Q What was the next step taken, Mr. Waldby?

A Mr. Parker instructed me to have the size of the project to involve 150,000 barrels of crude and 50,000 barrels of naphtha in Puerto Rico and a study continued on that basis.

Q Mr. Waldby, I show you P-217 and ask you if you can identify that document?

A It seems to have a page missing. There is no signature. This is the first page addressed to Mr. Parker and not a second page.

MR. MacCRATE: I will return to that, your Honor. I have been unable to locate our copy of it.

Q Plaintiff's Exhibit 217 you recognize as being the second study report that you prepared after the initial feasibility study?

A I'm sorry, I don't recognize the document from the number.

Q The document that I just showed you?

A With the page missing?

Q With the page missing.

A Yes, sir.

Q That was a study of the Algerian-European-Puerto Rican project done in September 1963?

A Yes, sir, that is true and it alluded to the preliminary study of the 300,000-barrel level and completed the study at the 150,000-barrel level.

Q What was the conclusion of the second report?

A I should say that the conclusion was that if management looked with favor on the project that it must require a great deal more study in order to make the economics definitive because In this study cost estimates were very rough, they were not of investment quality. Some of the chemical processes on there were only best guesses.

Market surveys had not been made as to prices which could be anticipated on certain of the petrochemicals so it was a study which involved an enormous amount of work but only brought to the attention of the management the potential for doing a great deal more work to determine whether or not it was economical.

Q What happened next?

A On approximately September 26 I had an opportunity along with others of my colleagues in the supply and development division to present status of various projects to the executives of Phillips Petroleum Company among whom were K. S. Adams, Mr. Stanley Learned and Mr. W.W. Keeler.

At this meeting I described other projects but I spent approximately an hour in summarizing the exhibit to which you have referred and asking management's approval to go further. I was naive in the approach and stated at the conclusion that we would go forward unless we were stopped.

MR. MacCRATE: I propose to offer in evidence but not read Defendant's Exhibits 142, 143, 144 and 145 and omit questioning the witness with respect to them unless there is some objection.

MR. MARKS: I have no objection to any of them.

THE COURT: Thank you. They are received in evidence.

(Defendant's Exhibit 142 through 145 for identification were received in evidence.)

Q Did there come a time in the fall of 1963, Mr. Waldby, when another Phillips employee was given special responsibility in the PEA project?

A There did.

Q When did that occur and who was the individual?

A A letter from Paul Parker, vice-president of the international department to Mr. C. C. Tate, vice-president of the refining department, asked for the services of Mr. Gordon Allan, a processing engineer, for about 90 days to work full time on the PEA project.

Q Mr. Waldby, I show you Defendant's Exhibit 149 for identification and ask you -- I will show the original copy which is a little easier to read -- and ask you if that is a letter of Mr. Tate to which you referred?

THE COURT: Is there any dispute about that, that Mr. Allan worked on this project?

MR. MARKS: No objection.

THE COURT: Why don't you state the date for rhe record?

MR. MacCRATE: There is handwriting on it --

THE COURT: Just tell us the date when Mr.

Allan came aboard on this project.

MR. MacCRATE: October 23rd, 1963, your Honor.

THE COURT: So stipulated?

MR. MARKS: We have no objection.

THE COURT: All right, October 23rd.

Q Mr. Waldby, how was the work divided between you and Mr. Allan during the ensuing two months?

A Mr. Allan was advised in the memorandum to coordinate his work with me and I received a portion of the memoranda which he sent in connection with the project and a portion of the answers to those questions posed.

I met with him one or more times during that period.

Q Do you recall a meeting with him in New York in October of 1963?

A I have refreshed my recollection with documents that such a meeting was held on October 31 attended by Jack Coan, C. W. Wolff, Willis Barber, J. G. Allen and myself.

Q Who was C. W. Wolff?

MR. MARKS: May we establish whether the witness has any independent recollection apart from the documents?

THE COURT: Well, yes. As I understand they had a meeting. I suppose they had a lot of meetings.

Do you remember this meeting?

THE WITNESS: No, sir, I do not.

Q You do not remember meeting Jack Coan at that time, is that your testimony?

A I do not remember the meeting at all.

Q Mr. Waldby, it has been stipulated that you sent a memorandum to Mr. Coan, J-41, to which was attached a memorandum that you had received from Mr. Conn.

In that stipulated exhibit your memorandum to Mr. Conn, there is a reference to an inquiry from Mr. Coan regarding his remuneration?

A Yes, sir.

Q What conversation, if any, can you recall with Mr. Coan with respect to compensation and remuneration?

MR. MARKS: I'm just a little unclear. My copy doesn't have any reference -- yes, I am sorry.

A I have a recollection of negotiation with Mr. Coan at that time, a figure for remuneration was arrived at but I have --

Q Can you fix the place --

MR. MARKS: The witness should be permitted to finish.

MR. MacCRATE: I was just trying to fix the time and place.

THE COURT: When was this?

THE WITNESS: It was I believe in November of 1963.

Q Where did it take place?

A It took place in my office.

Q On lower Broadway?

A Yes, sir.

Q Here in New York?

A Yes, sir.

Q Who else was present as best you can recall?

A I believe that only Jack Coan and I were present when he mentioned that he would like to take up the subject of remuneration. But it was not discussed in any detail or concerning what he would do or what the amount was at that time. He wished to take it up with management.

Q Did you have any further conversation with him at another time?

A Yes, sir, I did.

Q Can youu fix the time and place?

A It was some time shortly prior to November 22 in my office.

There were three people present, Mr. Stanley Learned, Mr. Jack Coan and myself.

Q Tell us as best you can recall what each one of you said?

A Mr. Coan recited --

MR. MARKS: I object to this.

THE COURT: Sustained.

You can't answer. He will frame another question. When I rule sustained you can't answer.

THE WITNESS: Yes, sir.

Q Mr. Waldby, can you recall anything that you said at that meeting?

MR. MARKS: I object.

THE COURT: Same ruling.

Q Can you recall anything that Mr. Coan said at that meeting? - - -

MR. MARKS: I object.

THE COURT: Same ruling.

Gentlemen, will you approach the side bar, please?

(At the side bar.)

THE COURT: Isn't this hearsay of the purest form?

MR. MacCRATE: It is like so much of the conversation that we have in the record her, your Honor, where we are going back so many years trying to piece together a story.

THE COURT: I will permit this witness to testify as to how much he paid Coan. I assume this conversation eventually resulted in some agreement on the part of Phillips and Coan as to how much Coan was to be paid and what he was directed to do.

I have taken a great deal of hearsay at the behest of both sides in this litigation but I think we do come to a point where when an objection is actually made, it has to be sustained.

MR. MacCRATE: Very well, your Honor.

(In open court.)

(Continued on next page.)

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Q Mr. Waldby, it has been stipulated that J-42, a letter from J. P. Coan, addressed to you, dated November 22, 1963 was sent to you, and is that your signature that appears under the word "Accepted"?

A It is a copy of my signature, yes, sir.

Q Did this follow after the meeting with Mr. Coan to which you referred?

A Yes, sir.

Q Did you receive any authority from any officer of Phillips to sign the document?

A Yes, sir.

Q From whom?

A From Mr. STanley Learned.

Q Mr. Waldby, I show you D-159. Can you identify that document for us?

A It is a memorandum to Mr. T. R. Holland from me, out lining my activities over a period of time.

MR. MARKS: That's already in, your Honor.

THE COURT: If it's already in evidence --

Q Mr. Waldby, can you tell us the circumstances under which that memorandum was prepared?

A I can only say that there is a discrepancy in the date that I left for Bogota, Colombia on November 23rd, and that this memorandum is typed as of November the 26th.

Q And the matters enumerated in the memorandum are what type of matters?

A One has to do with an agreement with --

Q No.

A Type of matters, pardon.

A promoters agreement with --

Q No, let me clarify my question.

A Yes sir.

Q You were going to be absent from your office for a period of time.

A Yes, sir.

Q And prior to your departure, did you prepare a list of the matters that might come up in your absence?

A I did.

Q And I think a list indicating those matters?

A Yes, sir.

Q Were you asking Mr. Holland to take any action with respect to the items enumerated in the memorandum?

A I note here that "Will you please advise Claude Trotter of this matter" with relation to one item.

Q Well, were you expecting Mr. Holland to take substantive action with respect to any of these matters?

A I was not.

Q Mr. Waldby, do you know if Mr. Durand and

Mr. Diaz-Hernandez visited Bartlesville early in December o

1963?

A '63? To the best of my knowledge they did not.

Q Well, did there come a time in December of 1963 when anyone from EDA visited Bartlesville?

A Mr. Diaz-Hernandez was there around the middle of the month. In the time period of December 16th and 17th.

Q For what period were you in Bartlesville during December of 1963?

A I was there overnight on the second. I traveled to Bartlesville on the 11th and stayed until the 17th when I returned to New York. I was in Bartlesville overnight on the 19th. I went to my parents' home town of Sweeney on the 20th. I returned to Bartlesville on the afternoon of Christmas Day, December 25th.

I stayed in Bartlesville until the 27th, at which time I returned to Sweeney. That's the December portion.

Q With respect to the period in the middle of the month, which I believe you identified as December 11th to December 17th --

A Yes, sir.

Q Incidentally, have you had an opportunity to refresh your recollection by reference to records from that time?

A I certainly have.

Q What can you tell us of your activities in Bartlesville between the 11th of December and the 17th of December with respect to the P.E.A. project?

A My principal activity was to participate in the deliberations and the drafting of a letter proposal from Mr. Learned to Mr. Durand with regard to the Puerto Rico petrochemical project.

Q Can you recall any specific meetings, giving us who was present?

A I recall a specific meeting chaired by Mr. W. C. Hewitt, who had only at about that time named vice president of the international department, and R. E. Elliot.

Q Is Mr. Hewitt still alive?

A No, sir. No, sir.

Q R. E. Elliot?

A R. E. Elliot and Dick Berger. My most specific recollection of the meeting is that to be included in the proposal was the amount to be spent for the petrochemical facility. It had been --

Q Is this in Puerto Rico?

A In Puerto Rico.

It had been cost estimated at 49,000,000, and we were to use that figure when Mr. Hewitt asked Mr. Berger of the engineering department whether or not it could possibly be built for any less than the 49,000,000, and Mr. Berger said that there was a possibility of it being built for as little as 45,000,000.

And so I remember that Mr. Hewitt caused the $45,000,000 figure to be adopted as to what we would obligate to spend for the core chemical facility itself.

Q In addition to Mr. Diaz-Hernandez, to whom you have referred, were there any other visitors in Bartlesville that you can recall during this period?

A Yes, sir, Mr. Jack Coan was there.

Q Did you see Mr. Coan and Mr. Diaz-Hernandez while they were there?

A Yes.

Q Did you have any personal meetings with one or both of them?

A I cannot recall them all. I had breakfast with Mr. Coan and Mr. Diaz-Hernandez.

Q Can you identify the date of that breakfast?

A It was either the 16th or 17th of December.

Q You indicated that you left Bartlesville on the 17th.

A On the 17th, yes, sir.

Q And to where did you travel?

A To New York City, on the occasion of a Christmas party for the supply and development division that night.

Q Do you recall with whom you traveled to New York on that occasion?

A No, sir, I do not.

Q When did you next return to Bartlesville?

A I believe that I spent the night of December the 19th in Bartlesville and proceeded on the 20th to Sweeney, Texas.

Q And you have indicated that you were then back from the night of Christmas, the 25th, until the 27th?

A At which time I again returned to Sweeney.

Q Did you thereafter travel to San Juan, Puerto Rico?

A I did.

Q Just tell us directly how you made the trip, what was your movement?

A My wife and I flew from Houston, Texas to Bartlesville. We flew with others by company aircraft to Miami, where we joined Mr. and Mrs. Martin Friedman, and flew by commercial aircraft to San Juan, Puerto Rico.

Q Can you tell us what materials your party took with you to San Juan at that time?

A We took two briefcases of materials, and I canno enumerate them all, but among them were slides by means of which Mr. Hewitt was to make a slide projection outlining the overall activities of Phillips, and among them were two brochures with a covering letter to Mr. Rafael Durand for delivery to him.

Q Two different brochures or two copies of the same brochure?

A Two copies of the same brochure.

Q Were you aware at that time that that brochure which you carried with you contained two sentences in its introduction copied from an earlier brochure?

MR. MARKS: I object to the form.

THE COURT: Overruled. Was he aware at that time that they were copied from another exhibit? That can be asked.

MR. MARKS: A lot more than two sentences, your Honor.

THE COURT: At least two. Let's find out if he was aware of it.

A I was not.

Q Did there come a time when you were informed of this?

A Yes, sir, there did.

Q Would you tell us when, where and how?

A It was in early 1966, Mr. Jack Coan told me that --

MR. MARKS: I object to this; conversation, hearsay with a dead man now.

THE COURT: I'm going to overrule any objection based on the dead man. However, I think the witness will be allowed to answer this particular question since this issue has been opened up in the case.

A Mr. Jack Coan told me that there was identical language between the Phillips brochure and a Prudential brochure.

THE COURT: This was when?

THE WITNESS: This was in early 1966.

pm

Q Can you fix the date any more precisely than that, Mr. Waldby?

A It is my believe that the date was February 14th of 1966.

THE COURT: And the place?

THE WITNESS: And the place at Bartlesville, Oklahoma.

Q Did you thereafter ascertain the basis of Mr. Coan's statement?

THE COURT: I don't know that I understand that question.

Q Did you know at that time the basis for Mr. Coan's statement, Mr. Waldby?

A I'm not sure that I understand the question either, Counsel.

THE COURT: That makes two of us.

Q Did you, at or about that time, verify the accuracy of Mr. Coan's statement?

A I did not.

Q When did you first do that?

A When --

THE COURT: Could you just give us a time, please, a year?

THE WITNESS: Yes, sir. I believe during the latter part of 1972, following my deposition.

THE COURT: All right, that's enough.

THE WITNESS: Yes, sir.

Q Mr. Waldby, at the meeting in San Juan, in early January 1964, was there any discussion of the brochure that you had taken with you to San Juan?

A I am sure there was discussion, but I have no memory of any specific discussion. I do know that we were asked to revise the brochure.

MR. MARKS: Objection.

THE COURT: Well, I will permit him to finish his answer.

MR. MacCRATE: Did that answer stand?

THE COURT: Yes. I will let that answer stand. He was asked to revise the brochure.

Q By whom was the request made to revise the brochure?

A By both Mr. Stanley Learned and by Mr. Rafael Durand.

MR. MARKS: Can we get a where, when, who was there?

THE COURT: You will have a chance to cross-examine him. I thought Mr. Learned had already testified that he had asked him to revise it.

Q Do you recall any instructions that you received at that time in that regard?

A Simply that I was to work with Sam Van Hyning with regard to changes which were desired by the Economic Develop Administration and proposed to go to Puerto Rico in order to do so.

Q Mr. Waldby, did you prepare a report of your visit to Puerto Rico in the beginning of January 1964?

A I did.

Q For whom did you prepare it?

A For Mr. Miller Conn.

Q Did you prepare it at his request?

A Yes, sir.

Q Was it prepared in the regular course of your responsibilities at that time?

A It was.

MR. MacCRATE: I would offer D-169 in evidence.

MR. MARKS: No objection.

THE COURT: It will be received in evidence.

(Exhibit D-169 was received in evidence.)

Q Mr. Waldby, after the visit to San Juan did there come a time when you actually worked upon preparation of revisions to the brochure?

A Yes, sir.

Q I show you D-170 and ask you if you can identify that handwritten document?

I show you the original handwriting so that you may examine that.

A It is my belief that this work was done by Graham Renberg with the exception of the last page which is in my own handwriting.

Q Graham Renberg was someone working with you at Phillips at that time?

A He was.

Q And the last page is in your handwriting?

A Yes, sir.

MR. MARKS: Your Honor, may we approach the bench?

THE COURT: I am going to take a brief recess at this time.

Members of the jury, you may step out of the courtroom.

(Jury left the courtroom.)

THE COURT: Perhaps you would step out also.

(Witness left the courtroom.)

MR. MARKS: I am going to object to that document, except for his own handwriting that he can identify.

I have no objection to that page.

THE COURT: Isn't it in the pretrial list? Is its genuineness really in dispute?

MR. MARKS: I will say this, Judge:

It is the first time that I knew that the rest of the document was written by somebody else.

THE COURT: Where did this come from during the pretrial discovery?

MR. MacCRATE: It was proeuced, your Honor, from the Phillips files and the handwriting of the first 10 or 11 pages is that of Graham Renberg and the last page is of Mr. Waldby.

THE COURT: Don't we have the final revised copy of the brochure in which this is merged?

MR. MacCRATE: We do, indeed, your Honor, and this shows the movement from January 2 to February 7th, February 7th being the date of the new brochure.

THE COURT: And they are both in evidence, the first one and this one?

MR. MacCRATE: Yes, sir.

THE COURT: I don't know why it shouldn't be admitted. If you will give me any reason I would entertain it.

MR. MARKS: The only reasons I have are two-jks

fold:

First, the document doesn't have any date that would connect it up so we could have some --

THE COURT: That is a proper matter for cross-examination.

MR. MARKS: The second reason is that the witness can't identify anything but the last page.

THE COURT: Well, its authenticity is not in issue. This paper is listed in the pretrial order.

MR. MARKS: I don't dispute that it is from Phillips files.

THE COURT: And pertains to this project, and it shows on its face it was generated some time after the great big flight where all these fellows and their wives took a plane from some place to some place, and then they deplaned at Miami, and they met Mr. Friedman and they took a commercial air flight to Puerto Rico.

Don't you think the jury gets tired of all that detail? I do. I must have heard about that flight about four times. They all took their wives. Their wives are experts on petrochemicals.

Please let's move this trial along.

MR. MacCRATE: There will be no further reference to that.

jks

THE COURT: Oh, I am not picking on anybody, Mr. MacCrate, but it seems to me it gets so detailed and so repetitious. If it affects me in this fashion, don't you think all these jurors got tired of hearing about it? They made little whoopie tours out of it.

What significance does that have? And why do you insit on telling us about it? We must move.

MR. FARRELL: Your Honor, I have one other matter.

I was talking to Mr. MacCrate and I have now received our proposed jury instructions which I would like to submit.

Mr. MacCrate asked whether we should exchange them at this point, and I said I did not know, and that I would ask the Court.

THE COURT: Off the record.

(Discussion off the record.)

6 pm

(Jury present.)

THE COURT: Exhibit 170 is received in evidence.

(Defendant's Exhibit 170 for identification was received in evidence.)

MR. MacCRATE: I will read to the jury just the first and last page.

(Exhibit read from.)

BY MR. MacCRATE:

Q Mr. Waldby, it has been sttipulated that a new brochure, J-50, was prepared By Phillips.

MR. MARKS: I object to the characterization.

THE COURT: All right. It has been stipulated that particular exhibit number was prepared by Phillips.

Q Can you fix the date whenthe preparation of that document was completed, approximately?

A Yes, sir. It was completed around February 7 of 1964.

Q Mr. Waldby, it has further been stipulated that this brochure accompanied the application to the Interior Department in May of 1964 and that thereafter was a public hearing on the 31st of July, 1964.

Did you attend that hearing?

A I did.

Q Did you appear as a witness?

A I did.

Q I show you a blown-up copy of J-54, a stipulated exhibit, and ask you if you can identify that exhibit?

A May I hold it, please?

Yes, sir, as it describes, it covers the materials that we would be producing from the initial chemical operations, certain volumes of certain chemicals and by-product motor fuel.

Q Was this an exhibit at the hearing in July 1964?

A It was.

Q And is this flow chart which bears the notation Exhibit 1, the same flow chart as appears in the brochure, J-50?

THE COURT: Is there any argument about this, whether it is the same?

THE WITNESS: I have compared it, your Honor. They are the same.

Q With respect to the second page of Exhibit J-54, can you identify that as an exhibit that was used at the public hearing in July of 1964?

A I can. These volumes of chemicals are the same as those yielded in the first chart.

Q What were coming out of the first chart?

A Yes, sir. I don't know whether they match on line but the same volumes and the same materials.

Q These two exhibits were presented at the hearing at that time?

A Yes, sir, along with additional documentation.

(Continued on next page.)

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Q Mr. Waldby, did you have any personal responsibilities with respect to the planning of the new facilities in Puerto Rico in the event that a quota was granted?

A Yes, sir, I did have.

Q And when were those responsibilities assigned to you?

A To be specific to your question, I was transferred from the international department to the refining department in Bartlesville in about June of 1965, and thereafter I worked entirely on planning of the facility, the process engineering for the facility in the event it were to be built; if that is responsive to your question.

Q I believe it is. And after the quota was granted, and the new company in Puerto Rico was organized, you were its first president, is that correct?

A That's correct.

Q And the facilities that are pictured on Plaintiff's Exhibit 237 and Exhibit 238 are located in what area of Puerto Rico?

A Well, those are our facilities, aren't they? May I step down?

Q I will bring them a little closer.

A I can't see that far.

Q You can stay on the witness stand, Mr. Waldby.

I will bring them to you.

THE COURT: As I understand it is already agreed that those are the facilities, is it not?

THE WITNESS: Yes, I simply could not see from the stand.

THE COURT: I understand that, but it has been agreed beforeyou came here that that is a picture of it.

THE WITNESS: Yes, sir, those are the facilities and they are located approximately four miles from the town of Guayama and approximately due south of the city of San Juan, across the island from San Juan.

Q On the south coast?

A On the south coast, yes, sir.

MR. MacCRATE: I have no further questions.

CROSS EXAMINATION

BY MR. MARKS:

Q Mr. Waldby, when did you first come to New York for PHillips?

A I believe I arrived on the 2nd of June, 1963 and went to work on June 3rd.

Q Where had you been stationed for Phillips before that?

A I had been stationed for sixteen years at the

Sweeney refinery and prior to that for ten years less militar service at the Phillips refinery near Borger, Texas.

Q So this was a promotion for you to come to New York in June, 1963, this was the big time?

A It was a promotion for me, yes, sir.

Q And you looked forward with anticipation to your new duties which included what responsibilities?

A I'm not sure I followed the question.

Q What were your new responsibilities going to be in New York in this promotion that you just had received?

A I was to work on the development of, primarily of refineries outside the continental United States.

Q You were assigned to the international department of Phillips?

A Yes, sir.

Q And prior to that time you had been working on domestic projects, is that right?

A Yes.

Q In Texas?

A On domestic projects, yes, sir.

Q When was the first time that you heard anything about a Phillips proposed project in Puerto Rico?

A To the best of my knowledge it was on August the 7th or 8th of 1963.

Q At that time, August 7th or 8th of 1963, Mr. Waldby, had you ever had anything to do in any manner with a presentation to any government agencies for an application for an oil import quota?

A No, sir.

Q You didn't know anything about that at all?

A No, sir.

Q Had you ever prepared a brochure for submission to the Department of Interior in any way?

A No, sir.

Q Had you ever been to Puerto Rico?

A No, sir.

Q Do you know anything about Puerto Rican facilities? Petrochemical facilities; at that time?

A Very little.

Q Who was the person that you met with at PHillips in August 7th or 8th, 1963?

A In what regard?

Q With regard to the Puerto Rican project.

A Mr. Miller Conn.

Q Mr. Conn advised you, did he not, sir, that he had been down to see Mr. Chpman the day before or the same day, is that right?

A That is my understanding, yes, sir.

Q And that he brought back with Mr. Chapman a document, is that correct?

A Yes, sir.

Q And that document you have identified as Plaintiff's Exhibit 215, is that correct?

Didn't you testify on direct --

THE COURT: He did. Let's go on to something new.

A Yes, sir. I just can't keep track of numbers.

Q Mr. Waldby, I took your testimony in this case prior to trial. Do you remember that?

A Yes, I do.

Q And do you recall that I showed you this very document?

A Yes.

Q And you said that you could not recollect whether this was what Mr. Conn had given you, isn't that right?

A Yes, that's true.

Q And then you amended your testimony, did you not, sir?

A I did.

Q And put in an affidavit, is that correct?

A Yes.

Q In your affidavit, sir, you still did not say that you could identify this document as the one being given by Mr. Conn, isn't that right?

A Yes.

Q So today, in 1976, sir, you are the first Phillips witness in nine years of litigation whose admitted ever seeing that document, isn't that right?

A I really couldn't answer that question.

MR. MacCRATE: Objection.

THE COURT: Sustained. How could he know what the other witnesses have admitted? Let's go on to something else.

Q Now, sir, this document was prepared by Prudential Oil, is that right?

A I have no knowledge. - - -

Q You saw from the document that Mr. Conn gave you that there was a brochure application by Prudential Oil for an oil import quota, wasn't that right? The title was, "Request for Oil Import Allocation, Puerto Rico Oil and Petrochemical Company," isn't that right?

A That's what it reads here, yes, sir.

Q Did you study the document that Mr. Conn gave you with regard --

A Yes, I have testified previously that I read everything which I was given with regard to Puerto Rico.

Q This was the only document, however, that Mr. Conn gave you, isn't that right? It was the first document you had ever seen on Puerto Rico, is that true?

A Mr. Conn gave me either with this document or in it a site study of Puerto Rico, called "Ti Liang Site Study."

Q I show you what's been received in evidence as Plaintiff's Exhibit 223, which is a copy of the same brochure which was produced by Mr. Chapman, and I ask you if that document refreshes your recollection as to the additional study that you said was attached to the material that Mr. Conn gave you.

A Yes, this is evidentally a copy of the Ti Liang report.

- - -

Q Together with the rest of the Prudential brochure?

A I haven't examined it, but I will be glad to if you'd like.

Yes, sir.

Q This brochure that you examined or studied in August 1963 reflected the fact and you knew at thattime, did you not, sir, that Mr. Shippee was supposed to be chairman of the board of the proposed corporation and that it was to be managed by officers and directors of Prudential Oil, isn't that right?

A The document so states.

Q In addition to that, sir, you also were concerned with the financing of the project, were you not, how much it was going to cost to put up the refinery and so forth?

A I was concerned with the economics. I had no--

Q With regard to the economics, sir, in this document, didn't it indicate that the Prudential Oil management was going to receive 27-1/2 percent of the equity of this project for putting it together and getting the oil import quota; wasn't that in the document too?

A I would have to examine it for that fact. I will examine it or you may show it to me.

Q It shows that 4,000,000 shares were going to management out of a total of 15,000,000 shares to be issued for the project.

A It says nothing about "given," does it?

Q Well, sir, it says that 11,000,000 shares are going to be offered to the public at $1 a share, bringing in a total of $11,000,000 in capital; is that correct?

MR. MacCRATE: The document speaks for itself, your Honor.

THE COURT: It does. He is merely being asked what he understood at the time that he first examined it in

August of 1963.

Q Well, did you ask Mr. Conn, "Isn't this study of another oil company for the same project? What am I doing with it?"

A No, sir.

Q Wasn't the first thing that Mr. Conn told you about this document was, "Keep this confidential," or words to that effect?

A Words to that effect, yes, sir.

Q Had Mr. Conn ever previously, in your dealings with him, or ever subsequently told you to keep any document that he gave you confidential?

A I do not remember any previously. I do remember one admonishment subsequently, yes.

Q When was that?

A When I left a copy of an executive committee letter of authorization with a government official in Bogota.

Q Did you ask Mr. Conn why you were supposed to keep this document confidential?

A No, sir.

Q Did you ask Mr. Conn what you were supposed to do with this document?

A No.

Q Did Mr. Conn indicate to you that the purpose of your using this document was in helping Phillips get an oil import quota?

A I do not remember him so stating, no.

Q Didn't you have that understanding sir, that you were going to be getting an oil import quota for this Puerto Rican project?

A We intended to get quota for a petrochemical project in Puerto Rico, yes.

Q And you were going to help on that?

A Yes.

Q And you had never had anything to do with that or any subject like that before in your life, had you?

A Sure hadn't.

Q And the first thing he gave you was Prudential's brochure to prepare this, isn't that right?

A My understanding of my assignment was of a technical nature, to begin with, and I knew nothing about the preparation of a subsequent brochure. It was to find a feasible way to produce petrochemicals in Puerto Rico at better than fifty percent yield. And that is the task I undertook.

Q Didn't you discuss with Mr. Fischbeck the concept for such a project?

A I had very little discussion with Mr. Fischbeck concerning the project.

Q Did you have any discussion with Mr. Fischbeck concerning the use of naphtha as the charge feedstock for the project?

A Yes, certainly that was mentioned in our Monday morning.

Q Right at the beginning of August when you first got involved?

A In the early part of August.

Q Did Mr. Fischbeck tell you what he testified here, that he, Mr. Young and Mr. Shippee discussed with him back in April or May of 1963 the use of naphtha as a charge feedstock for this project? Did he tell you that?

MR. MacCRATE: Objection, your Honor.

THE COURT: I will sustain an objection to the form of the question.

Q Did he tell you that he had conversations with Prudential Oil with respect to the use of naphth as a charge feedstock for the project?

A I have no recollection of such a statement.

Q But didn't he tell you that he had been having his conversations with Mr. Shippee and Prudential Oil?

THE COURT: Mr. Fischbeck.

A Not at that time, no.

Q Didn't you know Mr. Fischbeck in fact was listed as an operating officer in the Prudential brochure for the same project that you were working on?

MR. MacCRATE: Objection.

THE COURT: I will overrule the objection if that is what it indicates.

MR. MacCRATE: It is not the same project.

THE COURT: That is for the jury to consider. I will overrule the objection.

THE WITNESS: Will you repeat the question, please?

THE COURT: Reframe the question.

Q Were you aware of the fact that Mr. Fischbeck was named or his name appeared in the brochure of Prudential for the petrochemical project as vice-president of ope4ations?

THE COURT: Was he aware in August 1963?

MR. MARKS: That is correct.

A I was.

Q Did you discuss with Mr. Fischbeck how come his name was listed as an officer of the Prudential Company that was going to run this petrochemical complex?

A At some time.

MR. MacCRATE: Objection, your Honor. Again, another misstatement. He was not an officer of the Prudential Company.

THE COURT: Well, that may be. I will sustain that objection as to form but he may be asked whether he --

Q Did you have discussions with Mr. Fischbeck as to how he came to be listed as an officer of the company that is described in this brochure, which is the first thing you got when you started to study the problems?

A I cannot name the time or place but all that I remember hearing from Mr. Fischbeck was that he had not given permission for the utilization of his name in this function.

Q When did he tell you that?

A I cannot fix the time or place.

Q Was it within the last few years?

A It was early in the project.

Q Did Mr. Fischbeck tell you that he had reproduced or Mr. Holladnd reproduced 24 copies of Prudential's brochure as late as June 22, 1963?

A Certainly I do not recollect that at the time.

In the midst of this litigation in the last weeks I have heard a great many stories with respect to reproduction of brochures.

Q Didn't you ask Mr. Fischbeck are we working with Prudential oil in this deal?

A No, I had no idea that we were working with Prudential oil in this deal.

Q Did you ask him?

A Not to my recollection, no, sir.

Q Didn't the name of Robert Anderson come up in your conversations with Mr. Conn about his meeting with Mr. Chapman on August 7, 1963?

A I have no recollection of Robert Anderson being mentioned, no.

Q Were you ever --

A My understanding was that Mr. Conn met with Mr. Chapman.

Q Do you know that that meeting came about as a result of conversations between Mr. Chapman and Mr. Anderson?

A I have heard that alleged.

THE COURT: I don't want to hear the witness examined about what he has heard since the lawsuit commenced.

Direct your questions to the knowledge he had in 1963.

Q In 1963, Mr. Waldby, didn't you know Mr. Anderson was associated with this project?

A I had heard it rumored that Mr. Anderson was on retainer to Phillips Petroleum Company. Again, I don't know the time or place where I heard this.

Q Didn't you know he was working on this Puerto Rican project with Phillips?

A No, sir, I did not.

Q Didn't you hear in 1963 there was discussion amongst Phillips officials about whether there was an obligation to Mr. Anderson in connection with this project?

A No, sir. - - -

Q After receipt of this brochure, sir --

A Yes.

Q -- what specific concepts did you invent with regard to any Puerto Rican petrochemical complex?

A I don't know that myself that I invented any.

Q In addition to seeing Mr. Fischbeck listed as an officer of this company, didn't you also see a letter from Mr. Stanley Learned to Prudential Oil Corporation indicating that Phillips was going to counsel and assist Prudential Oil in the erection and development and operation of a petrochemical complex in Puerto Rico?

A I would be glad to examine the text of such a letter.

Q Do you have a recollection of having seen that?

A Yes, I do.

Q Wasn't that letter in fact included in Prudential's brochure, the first thing you got in connection with the project?

A Such a letter was included. I will look at its contents.

You wish me to read from the document?

Q I just want to know whether you were aware of the fact that Mr. Learned's letter to Prudential, which says that Phillips would counsel with Prudential and assist in the design, construction and operation of the proposed facility, was something that you were aware of in August of 1963?

A Yes, sir.

Q Did you make any inquiry of anybody at Phillips concerning the relationship of Prudential to Phillips in 1963?

A I may have. I have no recollection of it.

Q Didn't you know in your conversations with Mr. Conn in August of 1963 that Mr. Conn was going to make a report and study with a view toward submitting a brochure application to the Department of the Interior for an oil import quota for the Puerto Rican project?

A That is a rather long question. Will you repeat it, please?

THE COURT: Frame another question.

Q Didn't Mr. Conn tell you in August, August 7 or 8 in 1963, that a study was goinng to be undertaken with a view toward submitting a brochure application ro rhe Department of Interior for a quota?

A No, sir, not at that time to my recollection.

I was assigned -- I will not volunteer.

Q I show you a document received in evidence as J-40 dated August 8, 1963 which is a memorandum by Mr. Chapman's firm of a meeting with Mr. Conn.

I ask you to study that document and see if that doesn't refresh your recollection that you knew there was going to be a brochure application for an import quota?

MR. MacCRATE: What is the date of the document?

MR. MARKS: August 8, 1963.

THE COURT: Does the use of the word brochure application causing trouble with this question?

THE WITNESS: With me, your Honor, I thought our approach first was to the Puerto Ricans and that we were making a study of a worldwide project. Then following that we would see where it led.

Q In fact, sir, Mr. Conn made a memorandum of this meeting with Mr. Chapman in which he stated that there was going to be a brochure application, isn't that right?

THE COURT: What number is this paper the witness has?

MR. MARKS: The one he has is J-40.

A I note the mentioin of a quota and establishing a facility in Puerto Rico in general fashion. I am not aware of having seen this document before it was presented to me in 1972 on deposition.

Q I show you a copy of a document received in evidence as Defendant's Exhibit 136 which has been identified as Mr. Conn's memorandum of his meeting with Mr. Chapman and ask you whether that refreshes your recollection that from the very beginning there was going to be a brochure application for presentation to the Department of the Interior?

A This memorandum so states.

Q Does this refresh your recollection that in or about August 1963 you were aware of the facts contained in that memorandum?

A If I may read from it, my work to which I was assigned was in developing a further interest in determining whether or or not there was further interest.

Q In that connection you supervised or had headed up a study of the use of Algerian oil, is that correct, in connection with this project?

A That is correct.

Q That long list of names that Mr. MacCrate showed you with regard to people who worked relates to people who worked on the Algerian project, is that correct?

A It was on what we called the PEA project, Puerto Rico-Europe-Algerian project, yes, sir.

Q In fact, most of that work was discarded, isn't that right, because it was decided not to go forward with any --

A Certainly most was not discarded. Much of it formed the basis for our presentations to the Department of the Interior on July 31, 1964.

Q By that time dyou weren't using Algerian oil in connection with your proposed project?

A That is true. It is true but much of the work that had been done on chemicals, from naphtha was accomplished in those days of 1963.

Q Wasn't there, Mr. Waldby, a great urgency about the tasks that Mr. Conn had assigned you to in August of 1963? There was a rush, a deadline to do some reports and report back to Mr. Chapman?

A There were various deadlines set and few of them met, yes, sir.

Q I show you what has been received in evidence as J-45 which is Phillips' brochure of January 1964 and ask you have you ever seen that document?

A Yes, sir.

Q You worked on that document, did you not, sir?

A Yes, sir.

Q Did some of the drafting work on it?

A Yes, I did.

Q That document contained, did it not, a presentation that was made to Mr. Durand by Phillips in January 1964 of Phillips' concepts for this project; is that correct?

THE COURT: We all know that, let's go on to something else. Let's not waste time with things that the jury heard.

Q This document was widely distributed, was it not, Mr. Waldby?

A It did not have wide distribution, no.

Q I show you --

A This document, about 12 copies as I remember.

Q Who were the recipients of that if you can recall?

A If you have a list of them it will be easier to read them.

Q Mr. Learned had one, Mr. Allen had one, Mr. Slack had one, you had one, Mr. Baker had one, Mr. Hewitt, Mr. Coan, Mr. Chapman had five, is that correct?

A Yes, sir, that is about 12.

Q Do you have any explanation then, Mr. Waldby, for why this document that you have in front of you was not produced in this case until November of 1972 if you had a copy in the Phillips files? - - -

MR. MacCRATE: Objection.

THE COURT: Sustained.

MR. MARKS: I think I am entitled --

THE COURT: You are not and don't argue a ruling. If I make a ruling I don't want to hear a word from the lawyers in front of the jury. If you wish you can ask for a side bar conference later and tell me why you think I am wrong but I will not hear it in front of the jury.

We have to move this trial.

Q Didn't you have this copy in your files, a copy of this brochure in your own files?

A Not to my knowledge.

Q Doesn't it show you had one in your files?

THE COURT: I won't hear any more about it, absolutely not.

Frame another question.

Q What sections did you work on of this brochure, sir?

A I worked primarily on this letter to Mr. Rafael Durand and also on the tables.

Q Did you review this document prior to presentation to Mr. Durant?

A I can only state that some of the documents are typed as od December 30; that I was away from Bartlesville except for two days in the last ten days of December.

We got back on the 1st of January and left on the 2nd so if I had time for review, it was for very little review.

(Continued on next page.)

Q Now, I show you a copy of what's been received in evidence as Plaintiff's Exhibit 219, which is a copy of Prudential's brochure, with a Phillips cover on it, which was in Phillips' file in 1967.

Do you know how it got there?

A Are you asking our lawyer, or are you asking me?

Q No, I'm asking you.

A No, sir, I don't know how it got there.

Q Did you put it there?

A No, sir.

Q Were you aware that it was there?

A No, sir.

Q When did you first become aware of the term "core" as used in connection with a Puerto Rican petrochemical complex?

A Having said that I received this document, it must have been in August of 1963 through readingof the brochure. What might I call the brochure? Has it a name?

THE COURT: 215, I believe. Is that a right number?

MR. MARKS: Yes, your Honor.

Q Do you recall being asked this question on your deposition of September 20, 1972, at page 29, line 25:

"Q When did you first become aware of the concept of a core chemical industry for Puerto Rico?

"A I don't recall the concept of core, the time on a concept of core. It was in August that I heard about a petrochemical industry for Puerto Rico. Petrochemical manufacturer in Puerto Rico.

"Q When did the core first become learned by you?

"A I don't recollec.t

"Q Do you recall seeing the term Core Complex or Core Petrochemical Complex in the document that Mr. Conn gave you in August of 1963?

"A I don't recollect."

Did you give those answers to those questions?

A I did. And I spoke truthfully to the best of my knowledge.

THE COURT: What did you do between then and now which has modified your recollection?

THE WITNESS: I think, your Honor, that there were two things in particular, and I thought about this a great deal in addition to going over the various documents, and one is that I realized that I not only had heard the name of DAle Fischbeck as an officer of a proposed corporation, but that I had seen it.

THE COURT: All right.

THE WITNESS: And then I recollected, and I think this is during the last year, that in the first days, and probably over that first weekend during which I worked on the project, that I read a UOP report, and I had no knowledge of any source of it other than from this document, and so I have worked backwards on it.

Q Now, Mr. Waldby, you testified that in February of 1966 Mr. Coan had told you that Phillips' brochure had copied parts of Prudential's brochure, is that correct?

A I told you, that Mr. Coan said to me that there was identical language between the two brochures.

Q And at that point, sir, did you report that to your management?

A No, sir, I did not.

Q At what point did you do that?

A At a much later time, when I discussed it with counsel.

Q When was that, sir?

A My first --

MR. MacCRATE: Your Honor, I don't think the time he discussed it with counsel is appropriate.

THE COURT: Yes, I will sustain an objection to that.

MR. MARKS: May I approach the side bar, your

Honor.

THE COURT: Yes, certainly. I'm going to have to suspend very shortly.

(At the side bar.)

MR. MARKS: I want to make very clear on the record what our position is, which is that there's been a massive cover-up in this case by Phillips from the beginning of the litigation, in the following --

THE COURT: Why don't you give me that later, because I want to finish with this witness and let the jury go for the day.

MR. MARKS: Perhaps we could suspend at this point then.

THE COURT: Can't you finish up with this witness?

MR. MARKS: I don't believe I can, your Honor

TEH COURT: Well, you continue a little while longer with him and I will let you make your statement for the record later on.

(In open court.)

Q Mr. Waldby, you testified, did you not, that these charts, which are J -- together comprise J-54, were the flow sheets that were presented to the Department of Interior in the July '64 hearings, is that correct?

A I did.

Q As a matter of fact, sir, weren't these subsequently revised? These flow charts do not represent, do they, what is produced down in Puerto Rico today.

THE COURT: You're asking him now to compare this chart with what is actually being produced in 1976 in Puerto Rico?

MR. MARKS: Let me back up.

Q These charts were revised subsequent to July of 1964 on many occasions, isn't that true?

A There is not -- the initial petrochemical facility -- that could cost 45,000,000 -- is not substantially revised and I will be glad to cite for you how it is revised on this one. Now then --

Q How about the products? . . .

A These products?

Q And the ratio of the products and the amounts of them, haven't those been substantially revised since July of 1964?

A I can give you a few comparisons. And that is that the paraffinic fraction --

MR. MacCRATE: As of what time?

THE COURT: Yes, there should be a time fixed. I thought he was asking as of the present day. I don't know what difference it makes.

A These are substantially the products, the only thing is we do not make ethyl benzene which is listed here. We did not put in the facilities to make ethyl benzene because we decided it was not economical.

Q That was 62,000,000 pounds a year that you told the Department of Interior you were going to make, is that correct?

THE COURT: I don't see the relevance of this. I think we are wasting time here. I will take your offer of proof on this. No more on this. I will take your offer of proof after I excuse the jury. No more on the charts. You must listen to my instructions in this case, Mr. Marks.

MR. MARKS: Yes, sir.

Q With regard to the products that were proposed to be produced by Phillips in Puerto Rico, in July of 1964, isn't it a fact, Mr. Waldby, that some of these petrochemicals, the amounts that were being produced were in some cases 8 and 10 percent of the world market for those petrochemicals?

THE COURT: I'm going to take your offer of proof on that. I'm not going to waste time with it now.

Q Isn't it a fact Mr. Waldby --

THE COURT: No more about this or I'm going to cut off your cross examination of this witness. You must follow my instructions.

MR. MARKS: I will, your Honor. I'm prepared to make the offer of proof.

THE COURT: I will take the offer of proof after we left the jury go for the day.

Q In your work in connection with this project, sir, did you undertake to obtain a firm prior commitment from a chemical company to take the output of any of these products prior to the establishment of the core plant?

A I held conversations and others of the company held conversations concerning possible joint ventures or the interest of others in these products, yes, sir.

Q Did any of those materialize prior to the core plant being established?

A One of them, and that was the venture with Rhone-Poulenc in which he established the nylon plant which qualifies as a satellite and which I believe is listed in this chart.

Q Well Rhone-Poulenc was not the buyer, was it of the product?

A Rhone-Poulenc was a joint venturer with Phillips.

Q Who bought the products that were products?

A That was sold to.

Q Chemical companies?

A To textile manufacturers, yes, sir.

Q Mr. Waldby, with regard to the concept or the use of naphtha in this facility, hadn't you been using naphtha in the Sweeney refinery for many years?

A Yes, we had.

Q That was common knowledge in the industry that naphtha could be used as charge feedstock to produce petrochemicals?

A As both petrochemicals and motor fuel, yes,sir.

Q In your work on this project, sir, did you attempt to develop a refinery who might increase its stream of petrochemicals as time went by and reduce the motor fuel that was produced as an objective?

A At one time in our studies, we looked at a diversity of feedstocks, but made our decision to ask only for unfinished oils for naphtha as a feedstock.

Q As to your planning and study ing, were you planning to have a refinery that could product an increasing stream of petrochemicals and reduce the motor fuel production?

A Our planning at that time was to produce a constant amount of motor fuel, the maximum allowable, 24,800 barrels a day, because that was the most economic portion of the project at that time.

Q Didn't you do studies that showed a reduction in the motor fuel content as time went by and tables to that effect, charts and so forth?

A There may have been such studies but as regards our allocation for a period of ten years, it permittec the shipment of 24,800 barrels a day of motor fuel to the United States.

Q That was the final allocation. I'm talking about the planning. In the planning you considered --

A We made many plans, that's true.

Q Among the plans that you made were to reduce the amount of motor fuels, isn't that right?

A Yes, I would say so. . . .

Q In the early years you planned to produce as much motor fuel as you could because that was going to be the economic basis that would make this plant feasible?

THE COURT: He just told you that. No question about that, is there?

THE WITNESS: No. Motor fuel was the most productive.

THE COURT: He just told you that. Let's not be repetitious.

Q I show you what's been marked as Defendant's

EXhibit 142 and ask you if the first of the objectives in connection with your study was not to prepare a brochure detailing your plans for manufacturing 50,000 barrels a day of charge stock; that your first objective was to prepare a brochure?

A This is listed as the first of two primary objectives, yes, sir, in a memorandum of October the 8th, 1963.

Q Who did you report to with regard to this project? Was Mr. Keeler the executive, highest executive officer that you dealt with on a regular basis?

THE COURT: Is that two separate questions? Please separate them.

Q Was Mr. Keeler the highest executive officer that you reported to on a regular basis?

THE COURT: Do you understand the question?

THE WITNESS: I did not report to Mr. Keeler on a regular basis. I reported to Mr. Conn.

But in certain matters I spoke with Mr. Keeler. In certain matters, later on, with Mr. Learned and carried on negotiations with both.

Q Did you work closely with Mr. Conn and Mr. Parker with this project?

A As it ensued, I worked closer with Stanley

Learned and W. W. Keeler than I did with either Mr. Conn or Mr. Parker.

Q I show you two exhibits, Plaintiff's Exhibit 127 and Plaintiff's Exhibit 129, and ask you if those documents don't refresh your recollection that Mr. Anderson had a relationship to this project, in the references to Mr. Anderson in both of these documents.

A So far as I know, I have never seen this document.

Q Will you just indicate the number, sir?

A This is document listed as 127. To my knowledge I have never seen that document.

THE COURT: That's P-127?

MR. MARKS: Yes, your Honor.

A I don't recollect having seen the covering document, but I have seen the attached wire.

Q What didyou understand, if anything, was Mr. Anderson's relationto this project in 1963?

A I had no knowledge of his relationship to this project.

Q Prior to today, Mr. Waldby, have you ever testified that Mr. Coan told you in 1966 that Phillips had copied parts of Prudential's brochure?

A No, sir, I have not.

MR. MARKS: Your Honor, subject to your rulings on the other matter, I have nothing further.

THE COURT: Very well.

Members of the jury, will you return at 10 a.m. tomorrow. Please withdraw from the courtroom.

(Jury left the courtroom.)

THE COURT: You may step down, Mr. Waldby. Return at 10 o'clock also.

THE WITNESS: Yes, sir.

(Witness left the stand.)

- - -

9B pm

THE COURT: All right, now, I will take an offer of proof.

I am assuming you can show that the table reflex different production thanthe refinery actually makes. Perhaps this is a terrible fraud on the EDA but what on earth does it have to do with this trial?

MR. MARKS: The main point, your Honor, the production of some of the petrochemicals that Phillips was planning was so tremendous in terms of the world market that there was no way that they could market these initially on the Island of Puerto Rico.

THE COURT: Isn't that interesting?

MR. MARKS: But that ties in directly, your Honor, with the concepts Mr. Shippee has described, because his concept was that you couldn't possibly absorb all of the output of this petrochemical complex initially in Puerto Rico, you couldn't have a chemical manufacturer committed in advance to that. You would have to start by selling off the Island and then you would attract with low cost raw materials, you would attract these chemical manufacturers to establish their plants on the Island and give them preferences.

THE COURT: He probably has already testified -- if he hasn't, I think others have, and he certainly may be asked if it isn't a fact that as of the date the plant came on stream it was not possible to use or absorb these products on the Island.

MR. MARKS: That is all I was trying to get at.

MR. MacCRATE: But that is not Mr. Shippee's concept. Mr. Marks has now restated an entirely new concept which was not Mr. Shippee's concept. Mr. Marks has now restated an entirely new concept which was not Mr. Shippee's, and I refer to pages 202 and 203 of the transcript. This is what we run into all the time. The concept changes from day to day.

THE COURT: I can't have changes in the concept.

I told you all earlier before the plaintiff rested that I was going to hold you to the statement of the concept.

MR. MARKS: It is not a change. It is the same thing. He said no prior commitments from chemical companies, which is the line that the others had gone down and failed.

Let me make a second offer of proof.

THE COURT: Even if you can prove all this, you don't have to take a half an hour fiddling with the chart. That is what I find offensive.

Suppose he gave a totally ludicrous, fraudulent chart to the office of the import allocations. That wouldn't have a single thing to do with this case.

MR. MARKS: I anticipate that Mr. MacCrate is going to show that chart to the jury or he wouldn't have blown it up and he's going to say, "Look at this chart, ladies and gentlemen, and let's compare it with Prudential's chart. This is a different project."

Anticipating that, Judge, I think it is not unfair anticipation, and I should be able to cross-examine the witness.

THE COURT: You might be right. Please don't do it in such a pedestrian fashion.

Now comes out, you see. . . .

MR. MacCRATE: Your Honor, I suggest he use the Prudential chart for that purpose and see how far it gets him.

THE COURT: All right. Each of you are welcome to exchange suggestions at any time.

MR. MARKS: The second point, your Honor, is this:

At numerous points along the way, we have, in some instances, been successful, in others you have sustained objections. It is our contention that there has been in this case a massive cover up by Phillips from the beginning of this litigation and I point to the following items:

We took extensive pretrial testimony of Phillips executive after Phillips executive, including Conn, who got the brochure from Chapman. There was the interrogatories of Chapman. There was depositions of Parker and Learned and Keeler and Adams and on and on, and not one of those witnesses, your Honor, identified this document. They never saw Prudential's.

They never saw Prudential's brochure. They never heard of Prudential's brochure. They denied ever having access to it and that included Mr. Waldby.

THE COURT: He didn't really deny having access to it. He said he didn't remember having seen it and I myself was alerted by that answer. I do resent this concept that people can go to depositions and say, "I don't remember anything," and then show up at the trial and be full of knowledge.

It is a question for the jury.

He gave a plausible explanation of how he had reconstructed it and that is something you can argue to the jury, that he didn't testify the same, that he testified inconsistently on his deposition.

MR. MacCRATE: May I point out, your Honor, that his deposition was taken nine years after the event and the problem of trying to locate documents nine years afterwards is a horrendous one, and we were as anxious as anyone else to find this particular document of January 1964.

THE COURT: Now he remembers, you see.

MR. MacCRATE: With the aid of the documents that have been found.

THE COURT: He gives me a plausible excuse of how he reconstructed his memory. Those are matters for the jury.

MR. MARKS: Now the second point, your Honor, which is that from 1967 Phillips had in its files and did not produce until 1973 Prudential's brochure.

I think that is further evidence that the witnesses that we examined knew they had that document in their files. It was in Phillips's files in New York. None of these witnesses ever heard of Prudential. I think the jurors are entitled to know this.

THE COURT: When did Coan die?

MR. MacCRATE: March of '66.

MR. MARKS: That is the second point. The third point is after making comparisons among brochures which included the final Phillips brochure versus the early Prudential brochure, copies of which were shown to various Prudential witnesses in the course of their depositions, it turns up in 1972, in November, for the first time, that the January 1964 Phillips brochure has been around all the time, kicking around in somebody's files, with very extensive distribution to the top officers of this company. Never before produced.

We had already conducted depositions of Phillips witnesses, not knowing that they had a brochure in their file that was directly copied from the Prudential brochure.

All these facts, Judge, create very strong inferences and charge can be made to the jury concerning these inferences, and I think I am entitled to go into it and I think we are entitled to a charge on it.

THE COURT: I think as to depositions you are entitled to go into inconsistencies. If the witness was inconsistent he can explain it, he can try to explain it, and you are entitled to a charge as to deposition testimony.

You probably, for argument purposes -- I will assume that you can string them all together and tell the jury that you take them all together and they spell something.

As far as the difficulties that you apparently had with your pretrial discovery, it seems to me the more discovery here is in a case the more difficulties there are. I do not perceive that those difficulties in themselves can be any basis for any argument to the jury or for cross-examination of any lay witness or for any instruction to the jury.

We are talking about two different things here.

As far as a person who didn't recollect and now he does and he has an explanation, and that is all fodder for argument and it is fodder for the jury.

MR. MARKS: Non-production of critical documents I think gives rise to inferences of concealment that the jury is entitled to have.

THE COURT: I would not extent that to notices to produce, but I would limit that to the question of testimony on deposition, and you are entitled to argue and to havce an instruction where a person on the deposition says that he doesn't remember and now lo and behold he does, but I can't carry it or I do not believe that I should properly carry it any further than that.

MR. MARKS: I respectfully except to that.

THE COURT: It isn't quite clear to me exactly what you want to do. Where was the non-compliance? Somebody said on the deposition he didn't remember ever seeing the document.

MR. MARKS: There are numerous non-compliances that I thought I went through. Among others, the non-production of Prudential's brochure which has been in Philllips' files in New York from 1967, that document not being produced, though covered by a notice to produce.

MR. MacCRATE: It was not covered by a notice to produce, your Honor.

MR. FARRELL: It was covered.

MR. MacCRATE: And the simple facts are that everything that was sought and that we could find has been produced and produced well in advance of trial and whatever may have been the frustrations of preparing this case, as stale as it was, I would submit they are behind us.

THE COURT: Off the record a moment, gentlmene.

(Discussion off the record.)

(Adjourned to Wednesday, January 21, 1976, at 10.00 o'clock a.m.)

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PRUDENTIAL OIL CORPORATION

vs. 67 Civ. 3748

PHILLIPS PETROLEUM COMPANY.

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New York, January 21, 1976;
10.00 o'clock a.m.

(Trial resumed.)

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MR. MacCRATE: Your Honor, I believe the record should show the presence of Mr. Walker in the courtroom.

THE COURT: All right.

Is there objection to him being here?

MR. MacCRATE: Well, he is one who has testified and may be recalled. I don't know. . .

THE COURT: Well, is there a purpose of having the gentleman here?

MR. MARKS: He is here to assist us in connection with the expert testimony Mr. MacCrate is going to offer. We have no plans to reoffer him.

THE COURT: On your representation he won't be recalled I will permit him to stay.

(Jury present.)

ROY M. WALDBY, resumed.

THE COURT: Mr. Marks, have you concluded?

MR. MARKS: No, I have just a few questions left.

CROSS EXAMINATION (Continued)

BY MR. MARKS:

Q Mr. Waldby, I was asking you some questions yesterday about the charts that Phillips had included in its presentation to the Oil Import Board in July of 1964.

A Yes, sir.

Q I direct your attention to these charts which are marked J-54 or part of J-54 and under your schematic diagram for the production of various petrochemicals from this core plant, from your configuration would it be possible to increase, say, the production of one petrochemical say xylene by another 10 per cent by volume of what you have shown here and reduce another of the petrochemicals by about 10 per cent?

A Yes, it would be possible.

Q Similarly, would it be possible under your configuration to increase the production of say paraxylene by 10 or 15 per cent and decrease the production of one of the other petrochemicals?

A As limited by the equipment size.

Q But these changes would be possible within the configuration of the core refinery as you got it here, is that correct?

A In approximately 10 per cent, yes, with regard to paraxylene.

Q And the change that you would make in the production of petrochemicals would depend upon what markets you could find for them and what the prices were, is that right?

A Yes, that is true, and the capacities of the equipment.

Q So that if there were a customer who wanted more orthoxylene, for example, the way this plant was designed you could increase the production of that chemical and make less of some other, is that correct?

A It is not as applicable to orthoxylene as it is to others because we sold a chemical grade of xylene which did not permit the inclusion of a great deal of orthoxylene. We normally marketed it in a constant volume.

Q How about benzene, if you had a customer for benzene you could increase the production of benzene?

A To the limits of the dealkylation facility, yes, sir.

Q In other words, there was a fair amount of flexibility with regard to the petrochemicals that could be produced from this core plant as you described it, is that a fair statement?

A Yes, that is a fair statement. It also depended quite a lot on the characteristics of feedstock.

Q In the Prudential brochure and in the sheet attached they show a substantial production of one petrochemical called naphthalene, is that correct?

A Napthalene, yes, sir.

Q Napthalene doesn't appear on the Phillips flow chart but orthoxylene appears, is that correct?

A Yes, that is corrct.

Q Isn't it a fact, Mr. Waldby, that both naphthalene and orthoxylene are used to make a chemical called phthalic-anhydride which is a component part of paint and plastic?

A To the best of my knowledge it is true that both orthoxylene and naphthalene can be used to produce phthalic-anhydride.

Q About the time these charts were prepared the state of the art in the industry was that people were considering whether or not to manufacture one or the other of these two petrochemicals and started to switch into orthoxylene, am I correct?

A I'm really not familiar with the production of naphthalene other than that it was normally produced from alcohol. But I am familiar with the production of orthoxylene from petroleum products, yes, sir.

Q Both of those would be sold to the same type of chemical customer, is that correct?

A It is my understanding that the plant would have to be adapted or designed for one or the other but could not alternate feedstocks.

Q But these products were to be sold to the same type of customer, namely chemical customers going to make their phthalic-anhydride could make it from either one, is that right?

A That is my understand, yes, sir.

Q You indicated in your testimony, sir, that your studies indicated to you that naphtha was going to be used as a charge feedstock for the Phillips Refinery, is that correct?

A That naphtha was to be the feedstock to the core petrochemical facility and in fact has been.

Q Naphtha is crude oil that is partially refined, is that right?

THE COURT: Everybody knows that in this case. We have heard this for about the third week. He knows that and you know it and the jury knows it. Let's go to things that are in dispute.

Q Isn't it a fact, sir, that in 1968 Phillips made application to the Department of the Interior to switch back to a crude oil quota and not a naphtha quota?

A I have no knowledgfe of the date. There was an application which sought alternate feedstocks, some flexibility with regard to feedstock.

Q That flexibility was to be crude oil, wasn't that true?

A That is true, yes, sir.

(Continued on next page.)

THE COURT: You can do that on the same equipment that you had --

THE WITNESS: No, sir, we certainly could not. It would have required a very substantial additional investment in the multi-millions of dollars.

Q Why did you make that application to go back to crude oil?

A We were trying to put some pressure on our naphtha suppliers, since we were finding it difficult to bring naphtha at attractive prices.

Q Crude oil became more attractive and so you were going to substitute crude oil, isn't that right?

A Our ultimate calculations showed it to be uneconomical, but we sought that opportunity to bring in either naphtha or crude oil as a means of putting some pressure on our naphtha suppliers.

Q In fact, you asked to increase your allocation to 75,000 barrels a day of crude oil, didn't you?

A That's correct.

THE COURT: This was not Phillips' naphtha that was being used in this plant?

THE WITNESS: No, sir, we have always purchased from others our naphtha.

Q Now, in connection with your work on the Puerto

Rican project, did you make any presentations to Mr. K.S. Adams?

A Mr. K. S. Adams was present at one meeting on about September the 26th of 1963.

Q That was a meeting for what purpose, sir?

A That was a meeting for the purpose of the various representatives of the sales and development division of the international department to inform management of the status of their worldwide projects.

Q And there was a complete review of the Puerto Rican project at the time, is that correct?

A There was a review of what was called the Puerto Rican-European-Algerian project at that time, yes, sir.

Q And you made that presentation?

A I did.

MR. MARKS: I have nothing further of this witness, your Honor.

THE COURT: Any redirect, Mr. MacCrate?

REDIRECT EXAMINATION

BY MR. MacCRATE:

Q Mr. Waldby, Mr. Marks has spoken to you about what products can be produced by the petrochemical facility of the core.

A Yes, sir.

Q And you indicated a certain flexibility?

A Yes, sir.

Q Is that a flexibility of kind of product or of the amount of product that can be produced?

A I do best answer it product by product. I cannot answer it categorically.

Q Well, let me ask, could new and additional products be produced on this equipment without additional process units being added?

A Not from other than naphtha.

Q Well, could you produce additional types of products on this particular equipment?

A No, sir. No, sir.

Q Would you take us down the various products and indicate what flexibility as to amount of production there was with resp to each of the shown effluents or what comes out from the plant?

A Yes, sir.

With regard to the paraffinic fraction of 8,000 barrels a day, we operated for 1969, 1970 and 1971, my last full year there, at about 50,000 barrels a day capacity.

Our paraffinic fraction, while we always yielded 24,800 barrels of motor fuel or very close to that figure --

Q Was that the maximum?

A This was the maximum that was permitted by our regulation, our import allocation.

Q The import allocation limited --

A Fixed this volume at a maximum. Yes, sir. And we shipped about 24, 800 barrels.

This fraction normally varied --

Q Now you're pointing to --

A To paraffinic fraction, normally varied from about 5,000 barrels a day to 8,000 barrels a day, dependent upon the type of charge stock that we were able to obtain.

In other words, the less aromatic producers in the charge stock, the more paraffinic fraction, but it varied over about a 3,000 barrel a day_range, from around 5,000 barrels a day to around 8,000 barrels a day.

THE COURT: Excuse me, but isn't that feedstock both by specification as to its graft and what it contains?

THE WITNESS: Yes, sir, but it was normally bought only on a one year contract. We had one contract for a long period of time for 10,000 barrels a day. The balance of the material was normally purchased year to year, on a year to year contract.

And during that period --

THE COURT: So depending on what you bought, what you got out of it varied, is that what we are talking about here?

THE WITNESS: That is true and we bought some on the spot market. Yes, sir.

As far as cyclohexane is concerned, there is very wide flexibility between benzene and cyclohexane depending on the capacity of the equipment. Since cyclohexane is normally more valuable than benzene, there is a twenty percent volume appreciation when you can burn benzene to cyclohexane and they sell at about the same price.

We produced as much cyclohexane as we could sell because it was from the benzene, up to the capacity of the equipment.

Q What is cyclohexane used for?

A Cyclohexane is used almost entirely for the production of nylon.

Benzene is a very widely used chemical, produced from coal as well as from oil, and the base of many, many organic chemicals.

So we had flexibility to convert benzene to all of the cyclohexane for which we had sales.

Now then, as far as the toluene is concerned, we produced benzene from toluene and we produced benzene directly by extraction from the naphtha.

We had flexibility as regards the rate at which we ran this hydrodealkylation unit, to run it at a rate up to its capacity, sufficient to supply our demands of benzene and cyclohexane, and in normal times we maximized this operation because benzene and cyclohexane were more valuable than the chemical grade toluene which we otherwise produced.

But we did at time, when there was an excess of benzene and cyclohexane in the world markets, produce some chemical grade toluene.

Ethyl benzene was in our original plans. We found on further economic analysis that ethyl benzene is used as a precursor for producing styrene, and styrene goes into plastics such as in the telephone case there. This is, ethyl benzene is dehydrogenated to form styrene.

There is another method of producing styrene which involves ethylene and benzene, and that is a more economic method than the production of naturally occurring ethyl benzene, therefore we decided not to put in the fractionating facilities to produce this material at the time we started the plant.

Q Because it would have been more expensive to produce it on this equipment than in another way that is available?

A Yes, sir, that's right.

The orthoxylene we were late in getting started on those facilities, so that operation began a few months later than the rest of the plant. The material was in tremendous demand. It was produced at a maximum. We had a capacity -- we went higher than this capacity to around 120,000,000 pounds a year, and sold that at very attractive prices, some of which went to, I believe it is Hooker Chemical Company at Arecibo, Puerto Rico to their pthalic-anhydride plant.

I should mention that during the bulk of the time that this paraffinic naphtha fraction has gone to Union Carbide on the island for production of ethylene.

As regards paraxylene and our crystallization process, there is very little flexibility there. Paraxylene is the most valuable chemical per pound that we produce, and we try to maximize it but this process is such that it will only recover at the best operating conditions about half of the normally occurring paraxylene, and so it was our practice to maximize the production of paraxylene. It was our practice to maximize the production of motor fuel within the limitations, and there were two:

One was that we could not exceed 49.6 percent of the naphtha charged to the unit, and in case we could not exceed 24,800 barrels a day.

Q Mr. Waldby, were the various processes that you have described known to you prior to the time that you assumed your responsibility at the core facility in Puerto Rico?

A They were except for the dealkylation of toluene. We used a Phillips process but I was not familiar with thermal dealkylation, I was not familiar with that operation.

Q But all of these processes were known to the Phillips organization prior to the time that they were put into this core project?

A Yes, sir, that's true. We did some -- they were known to the Phillips organization. We did some licensing of processes, in particular, we licensed the sulfolane process for extraction of aromatics. We had other UOP type of extraction in our Sweeney plant, and since we were producing sulfolane at that time as one of our own chemicals in a U.S. plant, and because sulfolane was a preferable extraction agent, we licensed the sulfolane extraction.

Q And you were at the Sweeney plant before coming to New York in June of 1963?

A Yes, that is true, yes, sir.

Q And you had served there as chief chemist, did you?

as chief chemist and later superintendent of our storage and shipping of hydrocarbons and of the laboratory, yes, sir.

MR. MacCRATE: I have no further questions.

MR. MARKS: I have just one.

RECROSS EXAMINATION

BY MR. MARKS:

Q Mr. Waldby, am I correct that Phillips did not actually build this plant in Puerto Rico but they hired Universal Oil Products to build it?

A Phillips Puerto Rico Core, after its formation, hired Phillips Petroleum Company to supervise the construction of the plant.

We also, Phillips Puerto Rico Core, hired PROCON, and I don't know what those initials stand for.

Q They are a construction subsidiary of Universal Oil Products?

A Yes, that is correct. We hired PROCON to construct the plant itself under Phillips' supervision.

Q And that was the same company, was it not, that prepared the flow chart that was in the Prudential brochure, Universal Oil Products?

A Will you state your question?

THE COURT: Well, there is only one Universal

Oil Products and the jury can infer that if it has their name on it it is that company.

MR. MARKS: I have nothing further, your Honor.

MR. MacCRATE: Mr. Waldby, you may step down.

THE COURT: All right, you are excused.

THE WITNESS: Thank you, sir.

(Witness excused.)

MR. MacCRATE: Mr. Bruce Brown is coming down from the first floor. He's been sitting up there waiting, your Honor. Mr. Jemison went up for him.

THE COURT: The jury may withdraw to the jury room until the next witness arrives.

(Jury left the courtroom.)

(Recess.)

(Jury present.)

MR. MacCRATE: Mr. Bruce K. Brown, please.

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BRUCE K. BROWN, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MacCRATE:

Q Mr. Brown, what is your occupation?

A I am a consultant in the petroluem and petrochemical business. I am also a director, member of corporation boards but my activity is that of consultant.

Q On what boards do you serve?

A Right now I am serving on the board of the Ingraham Corporation and its subsidiaries, including a refining company and an energy corporation in Louisiana.

Q What is the nature of the business of the Ingraham Corporation?

A Generally it is serving the oil industry, some 17 subsidiaries including tanker companies, pipeline companies, a refinery, things of that nature.

Q Mr. Brown, would you trace for us briefly your education and background starting with the date of your birth?

Q I was born May 4, 1899. I graduated from the University of Illinois with two degrees, BS in chemical engineering and Master of Science in chemistry, organic science.

I was employed the first four years with a chemical engineering consulting outfit, Burgess Laboratory in Madison, Wisconsin. While there, they were in a patent lawsuit and I was assigned to help the patent lawyer as a young engineer and it interested me in patents.

So I applied for a job and got a job with Commercial Solvents Corporation in Terre Haute, Indiana where I handled their patent matters and their research.

The owners of Commercial Solvents Corporation were interested in still another process and they suggested that I come to New York and become associated in a patent law firm so I could handle these patent matters for them, which I did.

Q Were you admitted to the bar in due course?

A Not in New York. I am in the bar in Indiana and Illinois, the Court of Appeals for the District of Columbia and the Supreme Court. But I haven't practiced for years and years.

Q Will you pick up the story when you became a patent lawyer?

A Well, I was here a year and a half and quite happy but I was persuaded by the Standard Oil of Indiana to resign my work in this firm and become patent attorney for the Standard Oil Company of Indiana which caused me to move to Chicago. I spent 27 years with the Standard of Indiana, first as patent attorney, then general manager of research and development, then as director and vice-president.

But my services with the Indiana company and its subsidiaries was interrupted twice.

Q Would you tell us what you did during these periods of interruption and state when they were?

A During World War II I was invited to go to Washington and became the assistant to the head industry man who handled the oil business fromthe Government's standpoint. The Administrator of the Petroleum Administration was by definition Secretary of the Interior but he would appoint a deputy who actually did that work, Ralph Davies. I was one of Davies' assistants.

Then after the war was over I stayed active in relation to the Government by becoming chairman of a volunteer unpaid group, the Military Patroleum Advisory Board.

When the Korean War broke out I was asked to go back to Washington and I became the Deputy Administrator, the headman of the petroleum agency, my boss being Oscar Chapman, then Secretary of the Interior.

After my Korean experience in Washington I continued to be president of the subsidiary of Standard Oil Company of Indiana which was headquartered in New Orleans known as Pan Am Souther. It had two refineries, some crude production and market in six states.

There was a big merger that went on in Standard of Indiana organization and I was asked to come to New York to be with American Oil Company but I preferred not to come to New York, I preferred to stay in New Orleans so I left Indiana after these 27 years.

The first job I had after departing from Indiana was president of Petroleum Chemicals, Inc., which was a petrochemical company that had just been organized -- I was the fourth employee -- by two oil companies, Cities Service Corporation and Continental Oil Company.

I built up that organization, which built a number of petrochemical plants on Lake Charles that were served with feedstocks from the basic refineries of Continental and Cities in Lake Charles, Louisiana.

I held that job for four years but I decided

I wanted to quit it and so I went into practice for myself as a petroleum consultant.

Q What year was that?

A 1960.

Q Have you since that time been a consultant in the oil and petrochemical industry?

A I was for two years a consultant but then I was asked by Charles Murphy to come to Eldorado, Arkansas where Murphy Oil Company was located and became chairman of that company, so I dropped my consultant practice for two years, for four years and served as chairman of Murphy Oil Company.

Then since I had agreed to stay only four years and didn't wish to finish my life in the Town of Eldorado, I moved back to New Orleans.

One of the directors of Murphy was Mr. Fritz Ingraham of the Ingraham Corporation and he asked me if I didn't want to move in their organization, serve as business consultant and that is what I have been doing since 1966 except, as I stated, I have been active as a director and member of the executive committee of Ingraham and some of its subsidiaries.

Q Mr. Brown, are you being compensated for the time that you are giving in order to appear here?

A On a per diem rate, the same amount I charge Ingraham Corporation.

Q Mr. Brown, bringing you down and focusing in the time and directing your attention to the period 1960 to 1962, did there come a time when you were informed of efforts to establish a third petrochemical oriented plant and refinery in Puerto Rico?

A Yes, that occurred in December of 1961.

Q What happened in December 1961?

A Mr. Oscar Chapman whom I had seen daily for 19 months when I served in the Korean War asked me, telephoned me and asked me if I would help him.

He explained there was some group there that wished him to serve to get a quota so that more petroleum could be moved into Puerto Rico and a petrochemical plant built.

He was of course quite competent to get the quota but lacked refinery and technical experience. He told me that he told the group that he would do this unless I served him in a technical capacity.

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Q Have you followed the practice of keeping a running record of your activities?

A I have, sir, for many years.

Q Will you just state briefly what your practice has been in that regard?

A Since about 1940 I have dictated daily to my secretary either at the close of the day or more probably the next morning the business activities I indulged in.

I did a good deal of negotiating throughout the years and that was one of the reasons for keeping a record of who I talked to and what they said so it became a habit and I continued it to this day.

Q Mr. Brown, I show you Exhibit D-26 for identification. I ask you if you can identify that document?

A That document resulted from a deposition that I was asked to give in this case a couple of years ago and consists of pages that I have extracted from my diary starting in December 1961 and ending in June of 1962, when I left any interest in this case.

It doesn't have all the pages in it because I was in Australia almost a month and in Europe for ten days but it has all the pages in which there was any entry concerning my work with Mr. Chapman and Mr. Coan.

Q Mr. Brown, consulting your daily record, Exhbit D-26, can you fix the date of your first contact with Mr. Oscar Chapman?

A A telephone call received in my office on December 7, 1961.

Q Following receipt of that telephone call what did you do?

A That call was on Thursday. I agreed to come to Washington and confer with him the following Monday which I did, on December 11.

Q Did Mr. Chapman at that time tell you what he was talking about with this prospective client?

A Yes, he did. He asked my opinion of the feasibility of building such a plant and particularly getting such a quota from the Government to move in oil.

Q Did he identify what it was that this group wanted to do?

A Yes, orally.

Q What did he say as to what they sought to do?

MR. FARRELL: Your Honor, in the interest of time, most of this history has been stipulated.

Secondly, I think this is irrelevant and thirdly it is hearsay.

THE COURT: The conversations would be hearsay but if the witness went to Washington to attend a meeting with respect to organizing a petrochemical oriented refinery in Puerto Rico, he may so testify and he may give the date and tell us who was present.

I will sustain the objection to the conversations at the meeting but if there was a meeting about a refinery, he may so testify.

A . The meeting on December 11 was about this project and in addition to Mr. Chapman and some of his associates in the law firm, I met Mr. Gibbs who was a member of the little group trying to promote it. Other members of that group had been in Mr. Chapman's office that morning but my plane was late so I met the first day only Mr. Gibbs, discussed this project with Mr. Chapman and Mr. Gibbs.

Mr. Chapman gave me a copy of a brochure which Mr. J.-P. Coan who I later met left with him which described the plan for building a core refinery and petrochemical complex in Puerto Rico.

He loaned me that brochure. I took it and had lunch by myself and read it and while in his office I wrote an analysis of what I thought was significant because he was not technically trained and I was trying to give him a technical man's viewpoint.

(Continued on next page.)

4 a.m.

Q Does the analysis which you wrote appear in D-26?

A I have a copy of it. I don't find it in here.

Q Is there a reference to this brochure on page 143, Mr. Brown, of D-26?

A Yes.

Q After reading that page, does that refresh your recollection as to your evaluation of the brochure which you examined at that time?

A Yes.

Q Would you tell us what was your evaluation of that brochure?

A I gave it a mental evaluation and wrote Mr. Chapman a memorandum about it and my evaluation was that it would be very, very difficult to get a quota from the Oil Import Board, to move any more oil into Puerto Rico, because they already had two refineries that had much more product available than was needed on the island and was being shipped to the United States. And the only way I could figure that they could get a quota would be to emphasize the manufacture of petrochemicals.

Q What acquaintance did you have with the then-existing refineries in Puerto Rico.

A By sheer coincidence I had quite an extensive because the man who had been my executive vice president when I was running the subsidiary for Standard of Indiana in New Orleans was the president at the time, Roy Diwoky.

Q Of what company?

A Of Commonwealth Oil and Refining Company, which was one of the two existing petroleum refineries in Puerto Rico. . And I called there several times.

Q During the 1950s did you visit the Commonwealth Refinery?

A Yes.

Q And you were familiar with the facilities?

A Yes.

Q Were you at any time asked to take a position with respect to it?

A I was. Admiral Carter who promoted the project asked me to be the president of it. I had other commitments so I did not accept.

Later I thought I was going to be made a director of Commonwealth, but that did not happen either.

Q Did you continue to maintain contact with Diwoky and with the Commonwealth Refinery, through the '50s?

A Yes, I did.

Q So that what you were able to speak about in December, 1961 with respect to Commonwealth Oil Refining

Company was something of which you had personal knowledge?

A Yes, sir.

Q Do you recall, Mr. Brown, whether there was more than one study in the brochure that was shown to you?

A The first brochure which I looked at at noon, which Mr. Chapman loaned me, which had been obtained from Mr. Coan, covered a 100,000 barrel a day petroleum refinery in Puerto Rico. And it produced about 9,000 barrels a day of petrochemical products.

Q When you say petrochemical products, what are you referring to?

A I mean petroleum in forms in which it is not used to drive vehicles like railroad train and automobiles and boats and is not used for its heating value.

Q And you say nine percent of the products --

A No, 9,000 barrels I said. That would be about five percent.

Q About five percent?

A No, I beg your pardon, no. I'm sorry. You're right, about nine percent.

Q Nine percent of 100,000?

A Yes.

Q And what type of products would these be; can you identify them by name?

A Yes, ethylene, propylene, naphtha which is unfinished gasoline from which you can extract by distillation aromatic products such as benzene, toluene and xylene which are known in the trade as BTX products.

Q That letter is "B" as in Brown?

A For benzene, "T" for toluene, and "X" for xylene. BTX.

Q Do you recall any further meetings or discussions with Mr. Chapman at that time?

A Yes. I went back to my office and agreed that I would write him an analysis of what I thought of the whole project, the strong points, pitfalls, and the possibility of getting a quota to move in the oil, and I finished that report and mailed it to him on December 22nd. Later I discussed it with him.

Q Were you familiar with the oil import regulations in 1960, '61?

A I was, sir.

Q Mr. Brown, there has been marked in evidence as Exhibit J-21, a document, preliminary evaluation of the Petroquimica Puertoriquena, Inc. project.

Is that the study to which you refer?

A It is, sir.

MR. MacCRATE: Your Honor, I would like at this time to read to the jury simply the table of contents, and the material at the bottom of page 8 and at the top of page 9.

THE COURT: All right. You may do so. However, if plaintiff's counsel wish to read any other part of it at this time or later, they may do so.

(Mr. MacCrate read from Exhibit J-21 in evidence to the jury.)

Q What is CORECO?

A Commonwealth Oil and Refining Company. That's the same company to which I alluded.

(Mr. MacCrate continued reading to the jury from Exhibit J-21.)

Q Where was Ponce?

A South of Puerto Rico, that's the location of the Commonwealth Oil and Refining project.

(Mr. MacCrate continued reading to the jury from Exhibit J-21.)

Q "Opens the way," to what did that refer?

A Opens the way to obtaining the quota.

Q And the proclamation of March 10, 1959, what was its subject?

A That was, I believe, the original action by President Eisenhower to bar the importation of foreign crude oil in the United States except under the regulations specified.

(Mr. MacCrate continued reading to the jury from Exhibit J-21.)

Q Mr. Brown, what is a petrochemical as you use that term?

A It is a chemical that is derived in some way from petroleum. It can be any number of things from synthetic amonia to aspirin, but the only meaning is something that has been produced at least in part from petroleum.

Q You have used the phrase, standard petroleum products. What does that mean to you?

A It means what the courts and industry have both called fungible products, that is, things that everybody needs or nearly everybody, such as gasoline, heating oil, diesel fuel, number 6 oils for power generation, the point being that it isn't a specific market. There may be too much of it or too little, but it is a general product which anybody has some use for, everybody has some use for.

Petrochemicals are things which by definition do not have an unlimited market. You wouldn't go on the street out here to say "Does somebody want to buy some xylene?" because few people would use xylene. You'd have to seek them out, make deals with them to buy it.

Q The sale of the petrochemicals involves sales for specialized use, is that the substance of what you're telling us?

A That's right, sir, yes.

THE COURT: You're talking about a non-retail use, in other words?

THE WITNESS: Yes.

THE COURT: It has to be changed or used in some other fashion before it gets to an ultimate consumer?

THE WITNESS: Right.

THE COURT: All right. Let's go on.

MR. MacCRATE: Your Honor, I believe the witness was contrasting petrochemicals with the normal refinery products.

THE COURT: Gasoline or fuel oil?

MR. MacCRATE: Yes.

THE COURT: All right.

Q Mr. Brown, I show you Exhibit P-215, and from that exhibit I show you a flow diagram which is the last page of the volume. Would you examine that, please?

A I have, sir.

Q Is that flow diagram a design for a refinery or for a petrochemical facility?

MR. FARRELL: Objection, your Honor. The

diagram is in evidence. It speaks for itself.

THE COURT: Perhaps it is a matter for his expert opinion and you may cross examine as to it.

THE WITNESS: May I say it says "Refinery" on the drawing, "Proposed Puerto Rico Refinery."

Q On the basis of your --

THE COURT: I will sustain the objection and strike out the answer.

Frame another question.

Q Mr. Brown, is the flow diagram the same as a flow diagram for a petrochemical facility?

A No. Simply because it doesn't go all the way. It has some sidestreams from the refinery, like benzene, toluene, that are indicated as coming off, naphthalene. But it doesn't include anything, for example, for butylene or ethylene or polyethylene.

Q Are the petrochemical streams that come off from the refinery flow diagram indicated as to what volume there will be?

A They are.

Q And what is the extent of the volume of petrochemical production that would come from that flow diagram?

MR. FARRELL: Objection, your Honor. All these figures are on that chart. He's just going to read figures.

MR. MacCRATE: I believe, your Honor --

THE COURT: Is there a copy of the chart?

MR. FARRELL: There's lots of them, your Honor. I will give you the one in the blue book.

THE COURT: I won't have him just reading rom the chart. If it calls for a expression of opinion, I will take his opinion.

MR. FARRELL: This is the chart.

THE COURT: Both the same, are they?

(Discussion at the bench - off the record.)

THE COURT: I believe the question is asking for him to convert barrels to percentages, which of course anybody can do, but I will permit the witness to do that.

A I have done that, your Honor, and the amount of benzene, toluene and xylene is about 3,000 barrels total out of the 60,000 barrels crude charge. Naphthalene I have difficulty with because it is expressed in pounds, but it is relatively small.

It's the same order as the other aromatics mentioned. And that is all. -

THE COURT: The total barrels coming out of the refinery are not equal to the barrels coming in, are they?

THE WITNESS: No. Usually there is about a six or seven percent loss in the refining process, although that is not always true, your Honor, but it is always true as far as this case is concerned. There are hydrogenation processes sometimes used so that you put in 100,000 barrels of crude and you get out 105,000 barrels. But that is not this case.

Q Mr. Brown, I show you J-54 and ask you what percentage of the products of the petrochemical facility that is illustrated on that chart are petrochemicals -- what percentage of the petrochemicals of the feedstock?

A I think I can answer you this way:

That you're charging 50,000 barrels of naphtha, and you're getting back 24,800 barrels of gasoline. The rest of it is petrochemicals of one kind or another.

Q And can you relate that to a percentage of the feedstock for the plant?

A Yes, it is about half. Out of 50,000 barrels there are 24,800 that is not petrochemicals.

Q Contrasted with what percentage in the flow diagram of P-215?

A About 9000 barrels out of 60,000, that is six, something like that.

MR. FARRELL: Did I hear the witness correctly, six, 9000 out of 60 is six?

THE WITNESS: The chart says 60,000 barrels crude coming in and on this side of the chart you have about 3000 barrels out of 60 and then the naphthalene adds something more and I can't quite figure it readily but the whole thing would be about say 5000 barrels at most out of 60,000.

Q Mr. Brown, did you become acquainted with the incorporators of PPI?

A Slightly. I met Mr. Gibbs a couple of times, Mr. Worthy once. There was another man whose name doesn't occur to me at the minute, I never did meet and Mr. Coan I met.

Q Did you have a meeting with members of that group at any time?

A Yes, in Mrr. Chapman's office.

Q Can you fix the time of that meeting by referring to your diary?

A I can find telephone calls here, I have not located the date of the meeting yet, I am sorry.

Q I would suggest you look at page 4 or 5 of your noe 1962 papers.

A January 23rd shows in my diary, several pages of it.

Q Can you recall who was present at the meeting?

A Yes, Mr. Coan, Mr. Worthy, Mr. Gibbs. As well as Mr. Chapman and myself and perhaps Mr. Friedman. At least some other lawyers on his staff were there sitting, not indulging in the conversation but listening.

Q Did you at that time make any comments with respect to the Commonwealth Oil Refining Company?

A Do you recall what you stated at that time with respect to Commonwealth Oil Refining Company?

MR. FARRELL: Objection.

THE COURT: Sustained.

Q Are you familiar with the financial arrangements on the organization of Commonwealth Oil Refining Company?

A Yes, I am. I owned some stock and my friend Mr. Murphy owned much more and we had the SEC documents around. I knew Mr. Dewigy who was there at the time. I wrote Mr. Chapman a letter on January 29, two pages analyzing the financing scheme they had used and the next two pages I suggested one for our project.

Q Does that appear in D-26 that you have before you?

A Yes, it does, under January 29.

MR. MadCRATE: Your Honor, I offer in evidence those pages that the witness has just identified.

MR. FARRELL: Objection, your Honor.

THE COURT: It is not quite clear to me what pages are being offered. Perhaps counsel can approach the side bar.

(At the side bar.)

THE COURT: What pages are being offered? This is D-26?

MR. MadCRATE: Yes, your Honor. This is the appearance of the page (indicating).

THE COURT: Why isn't it admissible?

MR. FARRELL: The question should be why is it.

THE COURT: It relates to one of the issues of fact in this case which is whether there is a legally protected concept and failures of others, including the Gibbs group, were specifically brought into issue in this case at the beginning of the trial.

MR. FARRELL: But that is not the point. The point is that he is offering this letter as Mr. Brown's interpretation or analysis of the Commonwealth financing.

THE COURT: It goes beyond that, doesn't it?

MR. FARRELL: I don't think it does but it doesn't seem he has qualified Mr. Brown as an expert in financing but as an expert in petroleum and gas.

THE COURT: I will take it to show the nature of the opinion given by this witness to Chapman and Gibbs at or about the date it bears.

Isn't there a bottom line somewhere in this letter?

MR. MacCRATE: The bottom line is just on the second page and then there is attached to the memorandum an analysis with two further pages.

THE COURT: I believe it is admissible. I have to say that it is somewhat confusing. I don't know what he tells him really. I will take it and you may cross-examine as to it.

(In open court.)

MR. MacCRATE: We will mark it as 26-A?

THE COURT: Mark it 26-A.

xx (Defendant's Exhbit 26-A was received in evidence.)

MR. MacCRATE: There are four pages, a letter dated January 29, 1962 with attached organizational and financial plan of two pages.

THE COURT: This exhibit is being received as evidence of the opinion or information transmitted by this witness to Mr. Chapman on that date and not received as evidence of the truth of any of the facts therein set forth; merely that was his understanding or his opinion and that is what he told Mr. Chapman at that time by letter.

Q Mr. Brown, did the incorporators of PPI continue to work with Mr. Chapman after January of 1962?

A No. There were two things that happened either of which was sufficient to stop it.

One was Mr. Chapman got a letter from two people that I never met asserting a 50 per cent interest in the corporation. That was enough to stop him.

And then the other thing was that the Gibbs-Worthy group had no money. As a matter of fact, the first check, the retainer check they gave him bounced and they had to come back with another one. So that pretty much destroyed that group and he gave the check and I gave him back the money he had paid me out of it and we started all over again.

THE COURT: He being Mr. Chapman?

THE WITNESS: Yes, sir.

MR. MARKS: Can we fix a time on that?

THE COURT: Can you fix the time when this took place?

THE WITNESS: The 29th of January I think.

THE COURT: 1962?

THE WITNESS: Yes.

Q Did there come a time when you did receive compensation from Mr. Chapman for your services to him at this time?

A Yes, sir.

Q 1962?

A Yes, sir. This was in 1966. Mr. Chapman and I were close personal friends --

THE COURT: Don't volunteer information.

Q Mr. Brown, what was the compensation that you received from Mr. Chapman at that time?

A $300 a day for work away from my office and $200 a day for work in my office.

Q What was the total compensation that you received in 1966 from Mr. Chapman?

A He asked me to send him a bill in 1966 and I think $4700 for expenses and time.

Q After the break up of what we have in this record referred to as the Gibbs PPI group, did you continue to work on this project?

A Yes, in a limited way, although with interest. I was very busy.

Q With whom, Mr. Brown?

A Mr. Chapman who was handling the side of the thing that would require trying to get a quota. Mr. Coan was working the Puerto Rican and Universal Oil Products group and I was supposed to find a company that would be willing to invest in the plant.

MR. MacCRATE: I offer in evidence at this time Defendant's Exhibit 21 which is an invoice of Universal Oil Products Company December 23, 1961.

MR. FARRELL: No objection.

THE COURT: All right, received.

(Defendant's Exhibit 21 for identification was received in evidence.)

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Q During the period in 1962 that you were associated with Mr. Coan and Mr. Chapman did they to your knowledge receive any compensation for their work in connection with the Puerto Rican project?

A Not to my knowledge.

Q Did there come a time in early 1962 when you spoke with representatives of Hercules Powder Company?

A Yes, sir. By prearrangement I arranged to see them on January 31 handing them a memo, a descriptive memo.

Q Would you describe the nature of your presentation to them?

A The nature of the presentation was really most repetition of the report that I gave Mr. Chapman because the project remained the same and the difficulties and the advantages remained the same.

I was trying to interest them in making an investment in such a project.

Q Did Hercules express interest?

A At first they did.

Q What transpired thereafter between you and Hercules?

THE COURT: Can't we telescope this? Can't we get the date that they expressed interest and the date that they ultimately told him they were not interested if that be the fact?

Q Can you provide the dates?

THE COURT: Let's shorten it if we can.

A I once wrote a summary of all the dates. My problem is finding it. I can find it and bring it in.

Q Look, Mr. Brown, at February 3, 1962 immediately following the four pages that have just been marked in evidence.

Do you find a reference to Hercules?

A Yes, I wrote them a letter.

THE COURT: Is that the beginning of the inquiry with Hercules?

THE WITNESS: No, after my first -- my first inquiry was a call and this was a follow-up letter three days later.

Q Is that the letter you sent to Hercules at that time?

A It is.

MR. MacCRATE: Perhaps we can shorten this, your Honor, if I offer that letter in evidence at this time.

MR. FARRELL: May I see it?

No objection.

THE COURT: All right.

MR. MacCRATE: 26-B.

THE COURT: Received in evidence.

(Defendant's Exhibit 26-B was received in evidence.)

xx

MR. MacCRATE: It is a letter of four pages dated February 3, 1962.

Q Mr. Brown, following your letter to Hercules did you have a response from them and can you fix the date? I invite your attention to page 32 of your record.

A I set a target date of March 1st at which they were to be ready to discuss it.

Q I suggest that you turn to page 40 of your record and see if that provides further information as to the follow-up with Hercules?

A Unfortunately the copy I have here doesn't include page 40. I have 39 and it goes to 44.

I have a good memory if you wish to ask me that same thing.

THE COURT: Isn't the only thing that is relevant is that he went there, made a presentation and they expressed interest and ultimately at a particular date told him they were not interested? Isn't that what we are talking about? Can't we fix a date?

Q Can you find that date for us?

A The date when they told me no?

Q Yes.

A I will find it.

THE COURT: They said thanks but no thanks.

A It was in April some time.

Q Can you tell us what reasons if any Hercules gave to you for saying no?

A Yes, sir. They were big manufacturers of ethylene and propylene and polyethylene and polypropylene. As a matter of fact they were one of my customers when I was president of Petroleum Chemicals.

I knew of their interest in those things. I knew they were not interested in making benzene, toluene and zylene. What they told me was that after a rather elaborate study they decided they had all the polypropylene and polybutadiene they could use for a couple of years in the facility they already had, their market had not grown as fast and they might be interested in it later and that was the end of it.

(Continued on next page.)

a.m. jklt 1

Q Now, with respect to this project did you take any other action at that time?

A Yes, I contacted Phillips. There was some delay in it because I went to Australia and to Europe on other business in the interim, between my first contact with Hercules and the time I was able to see Phillips, so I didn't actually see Phillips until the middle of May.

Q Did you see any representative of Phillips at an earlier time to that?

A Yes, I was on my way to Europe and Mr. Coan and I had a meeting with Mr. Fischbeck of Phillips, whom I met for the first time, a man from Sum, a man from Celanese, and perhaps another man, which is covered in my diary under May 17th.

We discussed the project.

Q Is that May or March 17th?

A March 17th.

Q March 17th?

A Yes.

Q And where did that meeting take place?

A The Sheraton East Hotel, here in the city.

Q And what was the subject of that discussion?

A Well, it was Mr. Coan's meeting, and he had assembled these people whom he thought might be interested, their companies might be interested in a project, and I sat in the meeting, and discussed what I thought about it.

Q Did you express any views with respect to the possibility of obtaining an oil import quota?

A Yes.

Q What views did you express?

A That it would not be possible to get a quota unless we were able to show the import authorities that there were going to be petrochemicals made at the plant.

Q Did you indicate what volume of petrochemical production would be required?

A I do not recall that specifically, but I know that my policy and my position at the time was all that could be made, and that's why I wanted to use naphtha instead of crude oil as a raw material, because that would reduce -- it would increase the yield of petrochemicals relative to the total amount of petroleum that went in the plant. It would double it, really.

Q You have referred to a meeting with Phillips in May of 1962. Can you tell us how that meeting came about?

A I telephoned Mr. Keeler of Phillips, who was then executive vice president, whom I was well acquainted with because of our service for the government in Korea and wartimes, and told him that I had this project, told him that I had met with Mr. Fischbeck in March, and that Mr. Coan had told me that Mr. Fischbeck had declined, said that Phillips was not interested in it.

Mr. Keeler said over the phone that somehow that had never got to him and it sounded interesting to him, so he invited me to go to Bartlesville to talk to their whole operating committee, which I did.

Q Did you make a written presentation to Phillips in connection with that -visit?

A I did.

Q There has been marked in evidence as Exhibit J-31, a letter dated May 16, 1962 from you to the Phillips Petroleum Company, "Attention: Mr. Hewitt," with an attached memorandum, which has been marked as J-32, "Memorandum: A new petrochemical complex for Puerto Rico."

Is that the submission that you made at that time to Phillips?

A It is, sir.

Q Mr. Brown, what was your concept as to the role Phillips might play with respect to this project?

A It was my hope that since they were both a petroleum company, making ordinary petroleum products and petrochemicals, that they would be interested in putting up the major part of the money for a whole refinery which would produce petroleum products and petrochemicals.

I wanted them to do that because they were a fairly large company and had money to do it if they wished to, and I offered Murphy Oil Corporation as a partner. I had been talking to Mr. Charles Murphy about it. He was another one of my clients at the time.

Murphy would have been happy to have taken some petroleum products from such a refinery; about a third of the total would have been produced, if we had gone ahead with that plan.

Q Well, in connection with that plan, did you have any plan with respect to the disposition of the petrochemicals that might be produced from such a complex?

A No, because Phillips was producing the petrochemicals I had in mind in their U.S. refineries at that time and they knew more about how to dispose of them than I did.

Q Were you looking to Phillips to market the petrochemicals?

A Yes.

Q And they were an established marketer of petrochemicals as of that time?

A They were.

Q Now, during May of 1962, did you make any presentation that you can recall to anyone else with respect to this project?

A No.

Q Did you have any contact with any governmental agencies?

A Yes; Mr. Chapman and I called on the Oil Import Board administrator whom we knew, I knew, about this project; and it was an informal call; I mean, it was an informal meeting. He had a staff there. We were airing the subject. We were not asking, give us a quota for 50,000 barrels a day. We were discussing the prospects of it.

Q At or about that time had Mr. Coan prepared any materials with respect to the proposed project?

A He prepared a rather complete brochure for Mr. Chapman, including in it the Universal Oil Products refining plan which we had been discussing all through here. He had preliminary material which talked about Puerto Rico, the petrochemical business, what petrochemicals were and all of that.

Q Referring again to P-215 and the UOP flow diagram that is the last page in that volume, can you identify that in relation to UOP material to which you have just referred as being a part of Mr. Coan's study in 1962?

A No. I think what Mr. Coan had was the April

1962 report of Universal Oil Products, a 60,000 barrel a day plant.

Q I call your attention, Mr. Brown, to the figure here with respect to input, and that is 60,000 barrels a day, is it not?

A Yes, sir. But I think this was --

Q And I call your attention to the date of this flow diagram, 4/17/62.

A You're right. I'm mistaken. That must be it.

Q Can you identify that as the flow diagram that Mr. Coan had for your project back in April of 1962?

A Yes.

Q Now, I show you a volume that has been marked P-213, and ask you if you can identify that volume.

A Only in the sense that I looked at it briefly in your office. I had never heard of it until I started working, to prepare the testimony for this case, because it happened after I got out of the business.

Q Well, Mr. Brown, I call your attention to the listings of the proposed organization for Puerto Rico Petrochemical Industries, Incorporated, and to the enumeration of board members that appears on page 10.

MR. FARRELL: Objection.

A I have seen that page, but I did not see it in the brochure.

THE COURT: He said he has never seen it --

MR. FARRELL: That's why I'm objecting to the continuing questions about it. He said he never saw it until he saw it in Mr. MacCrate's office.

THE COURT: That is my understanding. There's no question at present before the Court.

MR. FARRELL: He answered it after the objection.

THE COURT: That will be all right. It will be the next question that the objection will be to.

All right, frame the next question.

Q Mr. Brown, you have testified that you don't recall seeing this particular volume, 213, before seeing it in my office.

Did you see, at or about April of 1962, pages that are in this volume at this time?

A Yes, I did.

THE COURT: Certain pages, some pages?

THE WITNESS: Yes, I found one, your Honor. It's got my name on it as chairman of the board. I remember objecting most vigorously to it, because I did not intend to be, and they were not authorized to do it.

THE COURT: You can tell us when you first saw that.

A I think I saw it in Mr. Chapman's office the day,before we went over to see the Oil Import Board administrator, May 2nd or some such date as that.

Q Did you see any portion of the earlier pages of the volume, summary, and then a section that is headed, "Petrochemical Industry"?

A Yes. I'm remembering it now.

THE COURT: You saw that particular book before you went to Mr. Moore's?

THE WITNESS: I believe this is the book we took to Mr. Moore's office. It's got this big list of petrochemicals, and I remember that I thought it was a poor brochure. Mr. Chapman thought so, and we did not file it.

Q Do you recall if in the volume that you examined, or in the papers you examined at that time, whether there were UOP studies?

A I think there was a UOP brochure attached to the back of what was presented. I know there was. It was the one thing in it that we felt was worthwhile.

THE COURT: At this time we will take a brief recess.

Members of the jury, you may withdraw to the jury room. Ten-minute recess.

(Recess.)

Q Mr. Brown, just prior to the recess you referred to having seen a UOP report in April and May of 1962.

I show you Defendant's Exhibit 336 for identification and ask you if that is a copy of the report to which you referred?

A It is.

MR. FARRELL: Could I see that?

May I ask a question about this?

THE COURT: Yes, certainly.

VOIR DIRE EXAMINATION

BY MR. FARRELL:

Q Mr. Brown, I call your attention to the notation on the front page, "Tables Section 3 and 6 missing."

Would you look in those sections and see if these are missing?

A I find a table in Section 3, a table.

I find a number of what are called tables in Section 6.

Q Do you know whether the table that you find in Section 3 was the table that was in there when you saw this document?

A No.

Q Do you know whether any of the tables in

Section 3 are the tables that you saw when you saw this document?

A No.

Q This particular copy you are holding is not the precise document which you saw at that time, is it?

A I have no idea. Mr. Chapman had the brochure from Mr. Coan. He and I went to the Oil Import Board Administrator, I looked at it then. I don't believe I ever had a personal copy of it.

MR. FARRELL: I object to any further questioning about this document of this witness.

THE COURT: Hand the document to the Court, please.

(Handed to Court.)

THE COURT: Will counsel approach the side bar?

(At the side bar.)

THE COURT: State the basis of your objection.

MR. FARRELL: Yes. It says on the very cover of that document that stuff is missing from it and when I asked him he didn't know whether the table that he now sees in Section 3 and 6 are the tables that he saw then.

He also said this is not the precise copy he had or looked at and we don't know whether the copy he saw had those exhibits and the exhibit itself has an inherent inconsistency in it.

THE COURT: That paper has not been produced at the pretrial discovery?

MR. FARRELL: That is true too.

THE COURT: What is sought to be shown with this?

MR. MacCRATE: The content of the overall UOP report in 1962.

THE COURT: Haven't we had that?

MR. MacCRATE: In separate pieces.

THE COURT: Didn't I already make a ruling in this area? I think it is unnecessary to come in with this document which is not in the pretrial list of exhibits and was not furnished at discovery and which apparently is not complete when there are other papers in the record. I think this issue has already been gone into in some considerable depth.

I will sustain the objection to 336 for identification.

(In open court.)

BY MR. MacCRATE:

Q Mr. Brown, I show you stipulated Exhibits J-24 and J-25 which have been stipulated to be portions of the UOP report of April 1962 obtained by Mr. Coan.

Can you identify those as documents that you saw in or about May of 1962 in Mr. Chapman's office?

A They appear to me to be the same.

Q Do you recall any observations which you made at that time regarding the UOP report?

A To Mr. Chapman?

Q Yes.

A Yes. We discussed it. I made an observation to him, he and I agreed the purpose of the meeting with the import people was to get a import quota not to discuss technical details and we felt that the only good thing in the brochure Mr. Coan had given him was the Universal Oil Products section. That is why we didn't file it, because the rest of it was a lot of stuff about a number of companies in Puerto Rico and the number of petrochemicals and didn't have anything to do with the question which was could we get an import quota.

THE COURT: That was your opinion, it didn't have anything do do with it?

THE WITNESS: That is why we didn't file it. We said we will come back when we have a customer.

Q Did there come a time when you had a response from Phillips after your presentation to them?

A Yes, I got a letter from them.

Q What did Phillips indicate to you?

A That they had no present interest. That was partly due, according to their advice to me, partly due to the fact that they didn't have any crude to dedicate such a thing. They already were kind of short of foreign crude and had enough capacity to make petrochemicals in their existing refineries in the United States for their then present needs.

They might be interested if they got some more crude in a couple of years.

Q To what did you attribute your failure in this six-month period of 1962 in being able to put together a project of this kind?

MR. FARRELL: Objection, your Honor.

THE COURT: Excuse me, read that back.

(Question read.)

THE COURT: I will take it as his opinion. I will overrule the objection but the jury will understand this witness is giving his own opinion.

A One of my principal reasons was that I didn't have enough time. This all happened between January and May and I had been in Australia for a month and England for about ten days with another client and the only two people that I had time to try were Hercules who had been a customer of mine and Phillips whom I had known all my business career as a competitor.

I didn't get any further and bowed out of the project because I agreed to become chairman of the board of Murphy and couldn't be any further in such a project. There are other reasons however in my opinion.

The principal one I believe is that unless a chemical company would agree to come right in and put up part of the money they would be sort of afraid to make a multimillion-dollar investment on an island where if they got into a quarrel with the supplier of the feedstock they wouldn't have any other feedstock.

(Continued on next page.)

6 a.m.

Q Were there any other factors which in your opinion contributed to your lack of success?

A Oh, I think probably the fact that Commonwealth Oil and Refining Company was already a refinery with a lot of petrochemical products didn't help any. They wre a pretty serious competitor, because anybody that went into Puerto Rico and made a new investment, to build a core refinery and petrochemical units would be in effect duplicating what Commonwealth was operating.

Q Are you familiar with the economic conditions prevailing in the petrochemical industry during the period 1961 to 1966?

A I believe I am, sir.

Q Are you familiar with the technical processes then employed to manufacture petrochemicals on a commercially feasible basis?

A Yes, sir.

Q Are you familiar with the other economic factors which affect the ability to produce petrochemicals on a successful, competitive basis?

A Yes.

Q Are you familiar with the Oil Import Control program in effect during the years 1961 to 1966?

A Yes, sir.

Q Are you familiar with various approaches taken during the period 1961 to 1966 for the construction of petrochemical facilities in the light of prevailing economic conditions in the United States and abroad?

A Yes.

MR. MacCRATE: Your Honor, I would like to read at this time from Mr. Shippee's depostion which I have placed on the top of the pile of depositions at your Honor's left, from page 142, commencing on line 9, and running to line 16 on page 143.

MR. FARRELL: I will object to that, your Honor.

THE COURT: I will have to take a showing at the side bar of why that should be permitted. The Court understood Mr. Shippee was fully cross examined here.

(At the side bar.)

MR. MacCRATE: Line 9 on 142 to the end of the answer on page 143, your Honor. It is Mr. Shippee's statement of which is concept was in the year 1967, and I respectfully submit that that which is closer to the event is the most appropriate measure.

THE COURT: I decline to take it in this fashion. Mr. Shippee was here. He was cross examined extensively. If there is some reason in the interest of justice to recall him as a defense witness, I might have to put up with that.

But to use his testimony in a deposition for the purpose of examining this witness, I think is inappropriate.

This witness may be asked what he did, what he knows, and what he thinks. That I have been allowing.

MR. MacCRATE: But your Honor, this is Mr. Shippee's statement of his concept, and as a party to the action, I respectfully --

THE COURT: He is not even a party to the action.

MR. MacCRATE: His testimony was taken here, and he has taken the position that it is his interest that is being asserted.

THE COURT: I will not take it at this time and in this fashion. If there is an application to recall Mr. Shippee as a defendant's witness, I might, after contrasting this with his direct testimony, entertain such an application. But not at this time in this fashion.

MR. MAcCRATE: I respectfully except.

(In open court.)

Q Mr. Brown, have you read the transcript of testimony in this case regarding the concepts of Messrs. Shippee, Willey and Young, with respect to the establishment of a refinery in Puerto Rico?

A I have.

Q You understand what is meant by a statement that a new concept was introduced after June 1962 with respect to the Coan-Chapman project by stopping the focus on getting a firm commitment from a chemical company and returning to the original focus of the core plant followed by satellites?

MR. FARRELL: Your Honor, I object to this.

THE COURT: I will overrule that. If he understands it. He is presented as a person with some experience in this industry.

A I do understand it.

Q What does it mean to you, sir?

A What it means is simply to build a refinery and solicit petrochemical plants to come in and take some of the products.

THE COURT: After the refinery is finished?

THE WITNESS: Yes, sir. It is not a new concept. That's what Commonwealth did.

Q Well, in your opinion was there any novelty in the idea of constructing a petroleum refinery in Puerto Rico in 1962?

A No, sir.

MR. FARRELL: Objection, your Honor. We don't have to show novelty.

THE COURT: Be that as it may, I believe such testimony may be admissible on another theory which I will discuss with you later, if necessary.

I think this last question is self-explanatory, however. You may answer it.

MR. MacCRATE: I believe he did, your Honor.

THE WITNESS: I did answer, but I will have to have the question again if I have to answer it.

THE COURT: I didn't hear the answer.

Q In your opinion, was there any novelty in the idea of constructing --

A No, there was none whatever.

THE COURT: Constructing a refinery in Puerto Rico, is that what the question was?

MR. MacCRATE: That was my question.

Q Mr. Brown, if you would wait for me to complete my question before giving your answer -- I was repeating, I realized, the question I previously had given to you. But so it will be clear, in your opinion, was there any novelty in a proposal to construct an oil refinery in Puerto Rico in 1962?

MR. FAJRELL: For the record, I'm objecting.

A No.

THE COURT: Do I understand correctly this witness is being asked with respect to that concept taken alone? Of course the answer has to be obvious. There is nothing novel about the idea of constructing a refinery, so let's frame the next question.

Q In your opinion, was there any feasibility in a proposal to construct an oil refinery in Puerto Rico in 1962?

A No.

Q And why not?

THE COURT: No feasibility to construct an oil refinery in Puerto Rico in 1962.

THE WITNESS: Yes, your Honor, because I had --

THE COURT: Never mind. He hasn't asked you the reasons.

Q Would you state your reasons?

A One reason is that the oil import administrator had told me that, when we went to see him.

THE COURT: You mean he told you you wouldn't get an import quota?

THE WITNESS: That's right, unless you had a petrochemical plant.

Q What is the difference, Mr. Brown, between a refinery and having a petrochemical plant?

A The refinery, alluding, for example, to the one that Universal proposed, to run 60,000 barrels a day, which has been in the record here, is a petroleum refinery which segregated some petrochemical feedstocks that are useful only if they go other petrochemical facilities.

Q In your opinion, was there any value in the idea of constructing a petroleum refinery in Puerto Rico in 1962?

A Would you tell me, value to who?

Q Was there any value to a potential investor?

A Yes, if he could get a quota.

Q But is it your testimony that it was all dependent upon getting a quota?

A It is. That is my testimony.

THE COURT: I think both sides are agreed on that aren't they? Is that in dispute in this case?

MR. FARRELL: I didn't understand that it was, your Honor.

THE COURT: And there is somebody in Washington who won't give you the quota, whether it's the President, the Secretary of Interior or whoever.

Let's go forward.

Q In your opinion, what was the nature of a showing that would have to be made to obtain an oil import quota in 1962?

A One thing, one very important thing, was that it would be judged, the application would be judged perhaps unfairly, but judged nevertheless on the amount of regular petroleum products; gasoline, heating oil, so forth, that would be produced as byproducts and have to be consumed in the United States market.

Q In your opinion what was the maximum amount of what you refer to as gasoline and petroleum byproducts that could be produced and still win approvla of an oil import allocation?

MR. FARRELL: Your Honor, I object to that.

THE COURT: Is he asking for an opinion the witness held then?

MR. MacCRATE: Yes, your Honor.

THE COURT: I think as so modified, I would permit that. There are already documents in evidence where he expresses his opinion in that regard.

A My opinion is what I gave in this report that is in evidence, on December 22nd, that you'd better use naphtha, thereby automatically reducing the amount of petroleum products that wouldhave to come into the United States in half, and then further reduce it by making as much petrochemicals as you possibly could, ending up with say no more than fifty percent of the product from the unit having to be exported for petroleum fuel use.

Q You understand what is meant by the statement that the core plant should be very flexible so it starts out as an existing refinery and is able to change over to a petrochemical refinery?

A Assuming that we're talking about one owner, starting out and building a core refinery, and that same owner adding the petrochemical facilities on the end of it, it would be feasible.

Q What do you understand to be the step by step process?

A Well, obviously nothing can be made of a petrochemical nature until the refinery starts to operate. And it was my hope that we could get some petrochemical units ready to take the feedstock from the refinery as soon as it operated. That's what I tried to get Hercules to do.

Q When you are without customers for petrochemicals can you establish a petrochemical facility?

MR. FARRELL: Your Honor, I object to that.

THE COURT: Well, that is a proper area for cross examination, you see. If the answer appears to you to be unreasonable, you can explore it by cross examination.

Do you understand the question?

THE WITNESS: I'd like to hear it again.

THE COURT: All right, read it back.

(Question read.)

A You cannot do it economically. You cannot do it without somebody being willing to spend the millions of dollars in advance of any customers.

THE COURT: I don't understand the answer, Mr. Brown.

If you are without customers, can you open a grocery store?

THE WITNESS: You can.

THE COURT: Because you hope when the door is open somebody will walk in and buy a loaf of bread.

THE WITNESS: But you can't do it economically, sir, because those are special products.

THE COURT: All right. In other words, you're saying they are not products that are traded in --

THE WITNESS: Generally.

Q Would you explain what you mean, Mr. Brown, that the products are not traded in generally?

MR. FARRELL: Your Honor, we have had this already. I object to this.

THE COURT: I will allow it.

A May I take one to start off with;ethylene.

Ethylene is made by cracking naphtha. It is used to make polyethylene which is a very much used plastic.

It is a gas. You can actually ship the gas to a customer miles away by pipeline, if you've got a customer. Or the customer perhaps could be persuaded to build his plant right next to your refinery and just deliver the ethylene by short pipeline.

THE COURT: How many refineries are there in the United States?

THE WITNESS: About 100 active refineries.

THE COURT: What do they do with the ethylene?

THE WITNESS: They don't make it sir, unless they have a chemical use for it, they don't make it. They don't crack the ethylene.

Q In order to crack the ethylene is it necessary to install a process?

A Yes.

Q With respect to the concept of flexibility in refinery construction what is the relation between installed processing units and the flexibility of a particular refinery's design?

A I wish you would word that another way. I don't understand the question.

Q Well, do you understand what is meant by a reference to a flexible refinery?

A I think I do.

Q What does that refer to?

A It refers to a refinery which would segregate the benzene, toluene and zylene that is used in the proposed basic refinery and would crack the ethylene and propane and prodoce olefins which could in turn be made into polyethylene rope and polyethylene paper, maybe into fabrics, threads, to be able to do all those things.

Now, since there are literally hundreds of petrochemicals it is not conceivable to me that you could build a refinery that woujld be ready to supply any conceivable demand for any petrochemical feedstock but you could build some units to take some of the products. It is a degree of flexibility.

I can't quite understand the flexibility of building something where you have products available for customers that haven't yet come, that you really don't have. It gets expensive, it gets so expensive that nobody in their right mind would do it.

Q How would you avoid such a lack of economic feasibility and make a unit economically feasible?

A You decide what petrochemicals you want to make and built the units to produce the feedstocks. For example, Hercules didn't want any aromatics, I was told that. If they had gone ahead with the project they probably would not put in an aromatic unit at all.

Phillips did like aromatics and so Phillips if we had been able to sell them they would probably put in an aromatic plant.

Q Do I understand that when the decision is made as to the petrochemicals to be produced, that a further decision has to be made for installation of additional units of equipment?

A Yes, sir.

Q And when you refer in this context to feasibility, are you simply referring to the fact that these additional units have not yet been built?

A The flexible refinery is a term that I didn't introduce. I have been trying to describe what it means to me.

Q What it means to you is having a refinery where you have not yet made decision as to what petrochemicals you are going to produce?

MR. FARRELL: I object to restating the testimony.

THE COURT: He is leading the witness.

I will let that answer stand.

Did you say yes?

THE WITNESS: Yes.

MR. MacCRATE: May we have the question and the answer read?

(Record read.)

A That is not what feasible means to me.

THE COURT: Doesn't it mean having a refinery where you can adapt and change the things you would be producing in order to meet whatever demand is placed upon you?

THE WITNESS: Your Honor, I know what your question is. To answer it I have to go to a refinery rather than a petrochemical plant.

You can decide after you build a refinery to for instance produce a stream of aromatics, the BTX having made the decision you can make the investment.

If after the refinery is built, as Commonwealth built one, somebody wanted to make probably ethylene, you can put a plant in to crack the ethylene and make ethylene and sell it to the people.

THE COURT: Is the layout of the refinery of any concern in attempting to do this?

THE WITNESS: Not particularly so long as you got plenty of land and drainage.

Q Each time you add a product do you add a new processing unit to make it?

A Generally speaking, yes, sir.

Q So when you have a basic refinery it is before you add these additional processing units, is it not?

A It is.

Q Do you know what it means for a refinery to have the character of a quasi-public utility?

A I know my interpretation of that term would be that it would be a refinery which would serve like a public utility and produce for customers what was needed.

And the quasi-public part would to my mind mean that sombody other than private industry would make the investment, at least a good part of it; use public funds.

THE COURT: Is that the way you interpret the phrase, as public funds or public access to the facility?

THE WITNESS: I interpret it as including investment by the Government of Puerto Rico. I have no idea whether I am right or wrong, your Honor.

Q qDoes the concept or language have any other meaning to you?

A Not to me. I never heard it except when I read Mr. Shippee's testimony.

Q Do you know of any oil or petroleum company in whicn such a concept was put into practice? Do you know of any?

THE COURT: How about a gas pipeline company?

THE WITNESS: That is a public service operation and under the law generally you must supply customers some part of what they want. You can't give more than you can get through the line but you are obligated to serve them. The same thing on electric power, I believe.

Q Mr. Brown, have you examined the terms of the quota which was granted to Phillips on December 23rd, 1965, which has been marked in evidence as J-84?

A I have.

Q Was that quota in the customary form of a quota or for the importation of crude oil into the United States?

A No, nor in Puerto Rico.

Q In what respects does it differ from the customary form of quota?

A A number of respects one of which is that it is not crude oil, it is for unfinished petroleum, meaning naphtha.

Another thing is that it must be used on the Island --

Q The Island of Puerto Rico?

A Yes. In a facility that has to be completed in 21 months, it will last ten years and Phillips can't trade it to somebody else, must use it, use in in the specified facility.

It must come from certain parts of the world, North or South America or the Western Hemisphere generally.

It cannot produce -- the quota of unfinished petroleum to be used, 50,000 barrels a day, cannot be used in such a way that the facility will produce more than 49-1/2 per cent or 24,800 barrels a day of motor fuel. That is unheard of in any other quota.

Then there is some regulation since they weren't accustomed to issuing quotas for something that is going to be built, something that was contrary to Government policy, it had to be specially granted here, they would grant a quota to be used while they were building the plant and when the plant was built, they would give them a regular quota.

2 Q Do you find any other prosisions of that that you can identify as unusual?

A Something here that is related to a contract with the Puerto Rican Government which I have not seen. It is not attached to this, it is alluded to.

Q It expressly incorporates reference to that contract?

A Yes, sir, it does.

Q Have you ever seen another oil allocation that included incorporation of a contract of that sort?

A No, sir.

MR. MacCRATE: I have no further questions of

CROSS EXAMINATION

BY MR. FARRELL:

Q Mr. Brown, I call your attention to the chart in Plaintiff's Exhibit 215 in evidence and I think you said that this refinery doesn't go far enough to be a petrochemical facility?

A Because it makes too little finished products, benzene, toluene and aromatics.

Q But if you continued the chart further this would be remedied?

A If you built some more plants you would take the $C_4$ mixture and crack it, the polyethylene and propane.

Q Benzene is not a petrochemical?

A It is a petrochemical.

Q You stated in your direct examination, did you not, that petrochemicals were not readily salable, is that true?

A That is true, yes, sir.

Q Is that true of benzene?

A To the householders, it is not purchased as far as I know, not sold at retail.

Q But there is a ready market for benzene?

A You could make gasoline out of it and use it in place of tetraethylene lead.

Q Is there a readily available market for benzene?

A I odn't believe so and I have been in the business all my life. I don't know where I would sell it except to somebody who wanted to make something out of it.

Q But selling it to somebody who wanted to make something out of it, there are people who want to make something out of it?

A You have to find them.

Q Do you have any idea of what the demand is for it, the total demand?

A Yes, a vague general idea.

Q Give me a vague general idea?

A We would find in this country about 15 million barrels a day of crude oil and many of the refineries separate their benzene, toluene and xylene and they get yields, total yields of something less than 5 per cent of what goes through. When they get it a good many of these people put the aromatics back in as gasoline and individuals making it put in tetraethyl lead and some is sold to make other chemicals, drugs, phthalic-anhydrides, plastics.

Q Now, when you gave us a percentage of tetrachemicals on this chart --

A Feedstocks.

Q That is what benzene is, a petrochemical feedstock?

A These are petrochemicals. You have to do something with the naphthalene and the only thing I can think of is use it as naphtha to keep away moths. Aside from that it is used to make other chemicals.

Q Naphthalene is a petrochemical feedstock, not a petrochemical, is that what you are telling me?

A It is a petrochemical.

Q The mixed $C_{4}$'s, are they petrochemical feedstocks?

A They are, they may be.

Q Did you include all that in your percentage?

A I included the approximately 3000 barrels of benzene, toluene and xylene and I guess these number of pounds of naphthalene would be a few hundred barrels so I said altogether perhaps 4000 barrels a day out of the 60,000.

Q But you did not include the mixed $C_{4}$'s?

A No.

Q Many of the products which are shown resulting from the refinery here are products which you would not obtain from naphtha, is that correct?

A Some of the products you would not obtain from naphtha.

Q Such as pitch?

A That is not a petrochemical.

Q I'm not talking about petrochemicals, I am talking about the gambit from what you took the percentage of, includes products which would come from crude oil but not from naphtha?

A That is right.

Q That includes pitch and fuel oil?

A Excuse me. Naphtha in that facility that one built, they would make an effort to meet the petrochemicals and you end up with some of the -- you are always bound to end up with pitch or asphalt, you have the residue that you aren't able to do anything with, which becomes fuel.

(Continued on next page.)

0 a.m.

Q But in refining naphtha you would not get the amounts of pitch and fuel oil shown on this chart?

A No, I don't believe so.

Q So that the way to increase the percentage of petrochemicals or petrochemical feedstock was simply to use naphtha?

A Right.

Q And the reason for that is that naphtha does not have a substantial amount of those products or those elements to begin with?

A Yes, that's right.

Q Mr. Brown, when you were working on this project in the early part of '62, you conceived it essential to have a contract or a commitment from a chemical company to use the petrochemicals or the petrochemical feedstock, is that right?

A Did you say concede or conceive?

Q Conceive.

A Conceive?

Q Yes.

A I conceived that in order to get a quota you would have to have some petrochemical plants built.

Q And the petrochemical plants would be built at the same time as the core refinery?

A Otherwise I didn't think you would get the quota.

Q In June 1962, by June 1962, you had talked to several chemical companies about making such --

A I talked to two.

Q What two were they?

A Hercules and Phillips.

Q Didn't you talk to Monsanto?

A No, I did not.

Excuse me, for a correction:

I sat in a meeting that Mr. Coan had March 17th here in New York, where he had a man from Sun, a man from Celanese, a man from Phillips, Mr. Fischbeck, but that was not my personal solicitation. That was Mr. Coan. I simply sat in on the meeting.

Q Were you aware of any other solicitations that Mr. Coan had made?

A Yes, he told me about them.

Q What companies were they?

A One of them was Phillips; one of them Sun; one of them was Mobil.

Q How about chemical companies?

A I think Celanese.

Q Celanese is a chemical company?

A Yes, it is.

Q Did Mr. Coan approach Monsanto?

A Yes. He said he did.

Q Any other chemical companies?

A That's all I can think of.

Q Now, in June 1962, when you received the letter from Phillips, which is J-37, which I show you, did you understand the project to be dead?

A Yes. They said it is quite possible the situation would change in the future. I don't know, maybe I answered that wrong. He indicated to me that they might be interested some time but they weren't interested then.

Q You didn't take that very seriously, though, did you?

A Yes, I did. In fact, I wrote a letter to Oscar Chapman about it.

Q You took that seriously?

A Yes.

Q Hum.

THE COURT: I really can't take "Hum" as any question.

MR. FARRELL: I'm sorry.

THE COURT: And as an expression of incredulity, it is out of order.

MR. FARRELL: I didn't mean it as an expression of incredulity.

THE COURT: All right.

Q Now, I ask you if you recall having your deposition taken in this matter on December 13, 1972 in New Orleans?

A I do, sir.

Q And I ask if you were asked this question and you gave this answer, page 145, line 9:

"Q So as of that date you regarded the project as dead?

"A And I reported that to Chapman, Coan, Murphy and anybody that had anything to do with it."

A That's right.

Q Mr. Brown, with respect to your conversations with Hercules, you were unsuccessful in interesting them in making a commitment to take petrochemicals, is that correct?

A I'd like to amend that to say I was also unsuccessful in getting them to invest in the refinery. I was trying to get them to do both.

Q But you were unsuccessful?

A I was unsuccessful.

Q And the reason for that was that they wouldn't commit themselves to invest in Puerto Rico and have only one source of supply?

A No, that isn't what they told me.

Q Tell me what they told you.

A They told me that they had already all of the polyethylene and polypropylene capacity in the United States that they needed to satisfy their market, and that -- in other words, they were caught up, they didn't have a shortage of the material, and they thought in a couple of years they might be interested.

Q Do you know what Monsanto's response to Mr. Coan was?

A No.

Q Do you know what the response of any of the chemical companies was?

A Only that he said that he was unsuccessful.

Q In 1962, in June, you did not send a bill for your services to Oscar Chapman, is that correct?

A That's correct.

Q Was that because you were so gloomy for the prospect of the project?

A Because he was an intimate friend of mine, struggling along in the law business and I didn't want to take any of his money unless he made some, and I told him that the first day.

THE COURT: He was struggling along?

THE WITNESS: He was, at the time, sir. He had been in government for years, and when he started in practice, he had one oil client, and he was pretty unhappy about it.

THE COURT: All right.

A And I offered to help him, and if he made any money, I would take the money; if he had gotten any stock, I would have gotten some stock, and later he got the money, and he paid me.

Q But did you say or did you think at that time that you would not send the bill because you were so gloomy about the prospects of the project?

A No, that was never discussed. He and I quarreled all the time about it. He once did give me a check for $1,200 and I gave it back to him.

Q Well, I'm going to ask you again if you remember at your deposition --

MR. FARRELL: I'm sorry, your Honor, I lost the place.

THE COURT: Well, I'm going to break for lunch at this time and maybe you can find it during the luncheon recess.

Members of the jury, would you return at

2 o'clock, please? You may now withdraw from the courtroom.

(Jury left the courtroom.)

THE COURT: You may step down, Mr. Brown.

Off the record.

(Discussion off the record.)

(Luncheon recess.)

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AFTERNOON SESSION

(2.00 p.m.)

BRUCE K. BROWN, resumed.

CROSS EXAMINATION (Continued)

BY MR. FARRELL:

Q I aas in mid-question so I will start again.

THE COURT: I don't recall that. I thought you were looking for a paper when we suspended.

MR. FARRELL: I was but the question was handing. I will start the question again.

Q Mr. Brown, at your deposition in this case do you recall at page 146 of the transcript being asked this question and giving this answer:

"Q But in any event he" -- he being Chapman -- "invited you to submit the bill which you did and then you were paid?

"A Yes. As a matter of fact, you can see from the letter I had to go back to my diary and reconstruct it because it seemed so gloomy to me I didn't prepare bills."

Did you say that?

A Yes.

Q Were you in fact gloomy in June 1962?

A Yes.

Q About the project?

A More accurately I didn't care because I quit the thing and had another job and was very busy with it. I didn't even think about it.

Q Mr. Brown, did Mr. Chapman agree with you that the quota could not be obtained unless you had a commitment from a chemical manufacturer to take the petrochemicals?

A During the period I was working with him he agreed with me, yes.

Q You testified on direct about the quota which Mr. MacCrate asked you about. Do you recall there was a great deal of opposition to granting that quota to fill it during this period?

A Yes, as an industry man reading the industry papers I knew there was a lot of opposition.

Q Was there not opposition because this was going to be of great economic benefit to Phillips in which the other oil companies weren't going to share?

A I interpreted the opposition as being to the fact that more product was going to come into the United States on the East Coast and that they would make less money from their products.

Q These products would be cheaper than the products that they produced with oil in the United States?

A I didn't read that in the papers that I read. It could have been true; I don't know.

Q You don't know if that was true?

A No.

Q Mr. Brown, in your direct you said you were being paid for coming here. How much are you being paid?

A $500 a day for work here and $300 a day for work in my office.

Q Was that true when you gave your deposition?

A That's right.

MR. FARRELL: Thank you.

REDIRECT EXAMINATION

BY MR. MacCRATE:

XX Q On your cross-examination, Mr. Brown, you referred to to the petrochemical plant or facility as necessary to obtain an oil import quota. Is the plant for the Phillips petrochemical plant which is depicted in J-54 of the same nature as you believed in December 1961 was necessary in order to obtain an oil import quota?

A Yes, sir.

MR. MacCRATE: I have no further questions.

THE COURT: Anything further for Mr. Brown?

MR. FARRELL: No, your Honor.

THE COURT: You are excused, sir.

(Witness excused.)

MR. UROWSKY: Mr. Joe F. Moore.

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JOE F. MOORE, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. UROWSKY:

Q Mr. Moore, will you state your educational background at the university level, please?

A I graduated from puglic schools in Oklahoma and attended the Massachusetts Institute of Technology where I graduated in 1952 with a Bachelor's degree in chemical engineering.

Q Will you state what experience you have had in petroleum and petrochemical industries since your graduation from MIT, please?

A After graduation I was employed as a refinery engineer by Humble Oil & Refining Company, now called Exxon. In that capacity I was a pracqicing refinery engineer, process designer and refinery economist.

In 1956 or at the end of 1956 I left Humble to form Bonner & Moore Associates which is a consulting firm. Since that time I have been practicing as a consultant in that industry.

Q Will you tell us, Mr. Moore, what kind of work Bonner & Moore does and for whom, please?

A Bonner & Moore's principal activity is as technical and management and economic consultants to the refinery industry and petrochemical industry.

Our principal offices are in Houston, Texas, we have one in Washington where we do some Government work and New York and we have a European office in Brussels, Belgium.

Our clients would normally be people like Gulf, Exxon, Amoco, Union Carbide, Celanese, Monsanto and people of that sort.

Q Mr. Moore, has your firm been engaged in consulting work with regard to petroleum and petrochemical facilities in Puerto Rico?

A Yes. We were first engaged in Puerto Rico about 1961 by Commonwealth Oil Refining, called CORCO. During the intervening 15 years or 14 years we have been working for virtually all of the refineries in petrochemical projects in Puerto Rico, specifically CORCO, Gulf, Union Carbide, Sun Oil and Puerto Rican Oil, a joint venture of Puerto Rico CORCO and PPG Chemicals.

Q Mr. Moore, have you been called upon in the course of your work in Puerto Rico and elswhere to prepare financial analyses and evaluations of petroleum and petrochemical projects over the years?

A Yes, we have.

Q Are you familiar with the techniques generally used in making such evaluations, sir?

A Yes.

Q Mr. Moore, approximately how many analyses or evaluations of petrochemical projects have you been called upon to prepare or have prepared at your direction over the years?

A Well, it would be hard to give an exact number but well over 100.

Q Approximately how many years have you been engaged in this activity?

A 19 years as a consultant and five years as an employee of the Humble Company.

Q Mr. Moore, does Bonner & Moore also engage as consultants with respect to refinery design and design of petrochemical and manufacturing facilities?

A Yes, we do.

One of our specialties or expertises is developing optimum flow methods for refineries and petro chemical plants and by that I mean the best choice of processing, the size of processes and the best operating conditions for those processes to maximize profits from a refinery or petrochemical plant.

(Continued on next page.)

2 p.m.

Q And have you personally been engaged in that work?

A Yes, I have.

Q For approximately how long?

A About fifteen years.

Q Mr. Moore, are you familiar with conditions prevailing in the oil and petrochemical industries in and about 1968?

A Yes.

MR UROWSKY: Your HOnor, I submit that Mr. Moore is qualified to testify as an expert in this proceeding as to the value of petroleum and petrochemical projects and the methods of financial analysis which are employed in making such evaluations.

MR. FARRELL: No objection.

THE COURT: He may testify.

MR. UROWSKY: In addition, your Honor, I submit Mr. Moore is also qualified to testify as an expert in regard to technical matters in the planning and design of petrochemical facilities.

MR. FARRELL: No objection.

THE COURT: All right.

Q Mr. Moore, haveyou had occasion in connection with this litigation to make a study of the Phillips

Puerto Rico Core project to determine what value a reasonable and informed investor would have as described to the core project in 1968?

A Yes.

Q And have you also had occasion to visit the core facility and to examine the basic agreements between Phillips and the government of Puerto Rico pursuant to which the facility was built?

A Yes, I have.

Q Have you also examined certain forecasts of petrochemical demand prepared by Phillips prior to the initiation of the core project?

A Yes, I have.

Q Mr. Moore, is this a copy of the report you prepared?

A Yes, it is.

MR. UROWSKY: Your Honor, I would like to offer this to be marked as Defendant's Exhibit D-340.

(Exhibit D-340 was marked for identification.)

Q Mr. Moore, would you tell his Honor and the members of the jury what general method you followed in determining the economic elements which would be used by a reasonable and informed investor in determining the value of the core project in 1968?

THE COURT: Before you go on with that, have these projections which he says he considered, been marked for identification? As I understand it, he had considered some projections of sales.

MR. UROWSKY: That's correct, your Honor. I don't believe they have been marked.

THE COURT: Unless it's waived, I would have them marked.

MR. FARRELL: No, I would like them marked. I had assumed there were going to be other exhibits.

THE COURT: If there are, I'm not aware of that.

MR. FARRELL: I'm not either.

MR. UROWSKY: Your Honor, I don't believe it will be required to mark them, since they aren't an essential basis of that.

MR. FARRELL: Your Honor, he just testified that he consulted them.

THE COURT: That's what I thought he said, that these were matters that he reviewed or considered in reaching the opinion he is about to testify to, and if an expert witness has relied on any documents or given them weight in reaching his opinion, at the very least, those documents have to be identified with some certainty.

It does not mean that they have to be offered in evidence or even that they could be received in evidence.

Q May I inquire, Mr. Moore, if you can identify the projections which you examined, please?

A By date or in what form? How do you want me to identify them?

Q Would you identify them --

THE COURT: Putting it very simply, do you have copies of these papers?

THE WITNESS: I think I do. Can I check my briefcase?

THE COURT: Can't we come back to this, if the man really has copies, I will let him go forward and he can find the copies during the recess. Will that be all right?

MR. FARRELL: That's all right.

THE COURT: We will save time. During the recess, any papers that the witness read, considered and relied upon in reaching whatever opinions he testifies to here today, must at the very least be marked for identification. And made available.

Q Mr. Moore, would you tell his Honor and the members of the jury what general method you followed in determining the economic elements which a reasonable and informed investor would have used in 1968 in determining the value of the Phillips Core project?

A Yes.

In any evaluation the basic element that you try to forecast or predict is how much money it is going to generate. We call this cash flow.

Very simply, cash flow is the money left over after you sell your product and pay your costs.

So in order to make such a forecast, it is necessary to predict how much you are going to sell, and since there are several products involved, what you would expect to get for these products, what their sales price would be, how much you think you will have to pay for the raw material and how much it would cost to build a plant, to operate the plant.

Now, we acquire this information or we forecast this information in the following way:.

For the prices of the products, I had my staff accumulate information which would have been available in the public domain, magazines and so forth, as of January 1968.

From this information we forecast independently what we probably would have forecast as the price of petrochemicals which Core manufactured.

We did the same thing for the Venezuelan naphtha which was used as the raw material.

From our own engineering and technical files and the knowledge of the processes that were in the Core plant, we calculated what the cost of operations would be.

From the Phillips reference which we have discussed, we estimated the volume of the various products which would likely be sold.

Incidentally, these forecasts involve starting out at a relatively low level of chemical sales and rising over a period of four years and operating at a level or selling at a level quantity of petrochemicals after the fourth year.

Q Mr. Moore, in making your analysis, did you take account of the relative cost advantage resulting from a oil import quota?

A We did; in the sense that we used the price of a Venezuelan naphtha raw material which would only have been available if Core had the quota.

Q Did you also take into account the reinvestment commitment which Phillips was required to make to the Puerto Rican government in order to obtain its support for the awarding of an oil import quota for this project?

A Yes, we did, in some detail.

Q Mr. Moore, would you take us step by step through the elements of your analysis, please?

A Mr. Urowsky, could I have a copy of my report, please?

Q Yes, sir.

A I'm going to be looking at table 7 in the report to make this explanation, which I guess is on page 17, I believe. Yes.

Let me first explain how I viewed the commercial operation of the Core facility or the Core project would work in light of the fact that Phillips had to reinvest all their profits for ten years.

I have said that the basic element that I calculated was the cash flow. Now, cash flow gets complicated a little bit because under the tax law you are permitted to set aside some of this money as depreciation, that means that after ten years or twenty years whatever the expected life of the plant has been, the depreciation allowance has enabled you to save enough money to rebuild this plant if it wears out.

So according to the tax procedure, one takes the money that is left over after you sell the product to pay the expenses, set aside the depreciation figure, and then what's left is called profit.

Now, profit may be taxed. In this case of course, the Puerto Rican government had given them a tax holiday, if you will, or they had waived the tax requirement for some years.

Now, since the requirement was that they reinvest the profit, obviously the owner or the investor did not have that money that we call profit available to him for his use. The only thing he could do with it was reinvest it and let's for simplicity's purpose say he was going to reinvest it in satellite plants because that was the intention.

Now, my problem was to decide how to represent this, that he would have to invest this money in satellite plants. And incidentally, once he invested in the satellite plants and they were making profits, these profits were available to him like normal profits.

So I did the following:

I said that after each year, the profit that was accumulated from that year of operation was immediately invested at the end of that year, that is, you went out and you started building a satellite plant; that this reinvestment begin earning profit itself two years later, the two years being the time required to design and build a plant and start it up. This would be typical for a medium-sized chemical plant.

So after two years, then, I calculated a cash flow which would have resulted from this reinvestment and which under the agreement the owner could use like any other profit, he could pay off the bank or build a filling station or drill and oil well or whatever he wanted to do with it. It was not limited in any way. And I calculated this cash flow which would have been equivalent to that investment earning fifteen percent. I didn't care what the investment was, I just said that the nature of this investment is such, it would earn a fifteen percent return. So this enabled me then to calculate a cash flow that would be returnable to the owner after he reinvested in a satellite plant.

Now, for each year I had two quantities which were available to the owner of Core. One was the depreciation allowance, because the agreement with the government said he could set aside the depreciation allowance in a specified amount, namely five percent of the cost of the plant in each year. So in all cases he had five percent of the plant costs and, let's say, that is roughly $3,000,000 a year. So that was available to the owner.

Also available to the owner were the profits from satellite plants that would be resulting from the reinvestment of his profits.

Now, I summed up those two quantities for the first, the first year I only had depreciation, because I was saving up that profit for reinvestment.

The same thing for the second year. The same thing for the third year. So for three years I accumulated the depreciation allowance for each year.

After the third year, I began to accrue profits from satellite plants. So for the fourth and later years, the cash flow that was returned to the investor was the depreciation allowance for each year, plus the profit from the accumulated reinvestment in satellite plants.

Now, the reason that I considered this as the proper cash flow is that this was the cash flow that was removed from risk, that is once the owner got his hands on that money, whatever happened in Puerto Rico, he was free of that risk. He could do whatever he wanted to.

Prior to that time, all of that money was subject or let's say the profits were subject to the risks of business conditions in Puerto Rico staying favorable.

Q Mr. Moore, have you had occasion to read the report preapred by Mr. James Walker of Purvin & Gertz in connection with this action? I'm going to show you a copy of that report now. It's been marked as Plaintiff's Exhibit 232 for identification.

I ask you to look at that to determine whether you have seen it before, and whether you are familiar with it.

A Yes.

Q And have you also had occasion to read the transcript of Mr. Walker's testimony at this trial?

A Yes, I have.

Q Would you tell us what are the basic differences between your projection of cash flows from this project and Mr. Walker's, if there are such differences?

A There is one very close similarity, and then there is a major difference. The first element of my analysis which was projecting the cash flow from the first core plant was done in a very similar way to Mr. Walker's. In fact, I did it as closely like his to try to make -- to avoid confusion, because he did it in a reasonable way.

At that point, though, we varied quite differently in how we consider the cash flows that were available to the [illegible]r. I consider that the ten year reinvestment commitment was a major factor in determining those cash flows, and Mr. Walker didn't consider, he didn't make a detailed analysis of that reinvestment.

Q Mr. Moore, in your opinion, can the Phillips Core project as it existed in 1968 be valued as an investment opportunity in isolation from the reinvestment commitment which Phillips was required to make?

MR. FARRELL: Objection to the form of the question, your Honor.

THE COURT: If the witness understands the question, he may answer it.

Do you understand the question?

THE WITNESS: Yes, sir.

THE COURT: All right.

A Yes, I think it was a very important point, and the reason I think it was important is because it substantially delayed the trial at which the profits could be withdrawn from the business environment in Puerto Rico or removed from that risk.

Q And can you tell me in your opinion what relationship there was between this investment commitment and the oil import quota, if you believe there was such a relationship?

A Well, I do believe there was strong relationship which is why I said that I thought the ten year reinvestment commitment was important. The relationship is this:

Risk in any investment or really anything you do risk is important and you have to consider it. In the case of the oil import quota, there was an unusual or an extraordinary risk involved with the business venture which relied on this quota and certainly the Core project did rely on the feedstock cost advantage that was offered by the quota.

Now, what was unusual about this risk? Well in my view, the risk was unusual in that the economic advantage of the quota was an artificial advantage. It was artificial in this sense:

It first depended on a continuing low cost of oil from the countries that produced and exported oil, and it was sold at a very low price; when the United States oil was selling quote a bit higher.

And secondly, it depended on the United States government's continuing to find it appropriate to withhold quantities of this inexpensive foreign oil from United STates consumers and I think that a prudent investor would have been concerned about relying on those conditions continuing to exist way into the future.

The reason that I think at this particular time in 1968 that it was of a particular concern was because of international events which had taken place in the previous year. I'm sure everyone is familiar with the term OPEC, the Organization of Petroleum Exporting Countries, and this organization was founded in 1961 under the guidance, leadership of Venezuela, and its purpose was to find ways of increasing the price of oil that these countries were selling, because it was their major wealth, and they felt they wanted to get the most they could for it.

For many years it was ineffective because of political differences, particularly among the Arab countries, just kept them from doing anything cooperative.

In 1967, in the five or six day war between Israel and the Arab countries, the Arabs were decisively defeated and this coalesced their political interest and all of a sudden OPEC, which had been kind of a squabbling group, became an effective organization and they immediately began to lay plans to increase the price of oil which they were selling.

Now I think an informed investor that might have been interested in buying Core would probably almost certainly have been very conversant with the international oil situation, and I think in January, 1968 he would realize that events were already under way that was going to raise those prices.

I don't think he would have thought that prices would have risen as far as they actually did, but I think undoubtedly there would have been doubt in his mind and particular concern that these economic conditions would exist very much longer.

Q Mr. Moore, will you tell us now what method of financial analysis you applied to the data which was generated with respect to the cash flows and distribution of cash flows in your study?

A I used the method which is called time to pay out or perhaps more commonly pay back.

Q Is this a recognized method of financial analysis used by financial analysts and businessmen in the petrochemical industry in valuing petroleum projects?

A It is a very widely used method, in fact proabbly one of the oldest methods in use in this particular industry, yes.

Q Mr. Moore, would you describe to us what the method is and why you employed it in valuing the project?

A Well, I think all of us are familiar with the idea perhaps of how long it takes to get our money back and if you put money in anything that is what you are interested in doing. The method has a formula and is a calculation procedure and if we take a more technical description perhaps that a financial analyst would use rather than just a normal person, a financial analyst uses the time before the investment is removed from risk and this idea of risk is inherent in the whole notion.

What it really means arithmetically it means if you take the cash flow that this investment will produce, how many years does it take before they add up to the investment?

If for example you invest $50 million and the project generates $10 million a year in cash flow, you would say this pay out of time to pay back was five years because in five years you have your original $50 million return and removed from risk.

Q Mr. Moore, will you explain to us exactly what you did in applying the time to pay out method to this project?

A I did two things:

First I reconstructed in my mind the guide lines prevalent in the industry as of 1968 for the use of time to pay out.

Those guide lines were generally these:

It was considered that an oil refinery that would be built in the United States should pay our or return the investment to the owner within five or six years.

Petrochemical market, which was considered necessary to pay an investment quickly and typically four or five years was a guide line.

An overseas petrochemical plant, because it was, apart from the political risk associated with it, generally three or four years was considered adequate time to pay out. I started with these guide lines.

Then I said an investor in core would mostly be concerned with how long he thought these economic conditions would continue to prevail that enabled the core plant to make the projected profit, how long would the import quota retain its value.

I tried to conceive of two hypothetical investors that would be knowledgeable and would have the kind of funds that would be required to buy core. So I defined two investors. I took first a conservative guy, really worried about the risk that he ran and the risk of the Arabs rigging up the price of oil and he might not be willing to wait more than three years to get his investment removed from risk in Puerto Rico.

So I took my cash flows which I had calculated in Table 7 and said in three years how much money would that investor have gotten back and, of course, in three years he only got $10 million back so this would be perhaps the lowest price that an investor might offer for core.

I hypothesized a more speculative investor who said I am willing to take a chance and I will certainly let my time to come to pay out go longer because I think that the profits several years from now are going to be very good and I will go six years before I want my money back and money removed from risk.

According to my calculation in six years he would have projected to have recovered $37 million.

So I think this was the range that knowledgeable and informed investors would have offered for core, $10 million to $37 million.

THE COURT: Plus the cost of construction.

THE WITNESS: No, $10 million to $37 million, period.

THE COURT: He would have offered $10 million for the plant that cost in excess of $40 million to build?

THE WITNESS: Yes, sir. However, I would apply weight to the 37 because I don't think the $10 million guy would ever have gotten around to negotiating. Let's take the $37 million figure.

This is obviously less than the cost of the plant as the Judge said and probably less than the money they borrowed. So to me the company had no positive value to its owners in 1948. I don't think they could have found anyone who would have paid them to build a plant in the light of the obligations which had been assumed to build the plant, particularly the ten-year reinvestment criteria.

Q Mr. Moore, are you familiar with the terms of the oil import oil quota which was awarded to Phillips for the core project on December 23rd, 1965? I believe that has been marked as Joint Exhibit 84 in this proceeding.

A Yes, I am.

Q Were there restrictions placed in that quota on the use to which it could be put, sir?

A There were two unusual restrictions, unusual with respect to what a typical quota had.

The two restrictions were, first, that the oil brought into Puerto Rico under this quota had to be charged directly to the core plant. It could go nowhere else. No excess oil imported except what went into the plant and that was unusual.

Secondly, this core quota could not be traded to another party, it could only exist in the name of the owner of core.

Those are unusual restrictions that did not apply in the normal quota.

Q In that regard, Mr. Moore, how would you determine the value that the quota had?

A Because it was restricted to core I think the quota had no value that was apart from the value of the total core project so I would assign the same value to it as to the core project.

MR. UROWSKY: I would at this time like to offer Mr. Moore's report in evidence, your Honor.

MR. FARRELL: Objection.

THE COURT: Sustained.

Q Mr. Moore, have you had occasion to examine the refinery flow sheets contained in the project plan brochure which has been marked in this proceeding as Plaintiff's Exhibit 215?

I am going to show it to you and ask you to look at it to determine if you have examined it before?

A Yes, I have seen this.

Q Mr. Moore, in your opinion is the refinery plant set out in that flow sheet similar or substantially similar to the core project which Phillips actually constructed in Puerto Rico?

A There is virtually no similarity.

2 Q Will you explain to us what the differences are between the project which is represented in that flow sheet plan and the project which Phillips actually undertook to construct in Puerto Rico, please?

A I will begin by trying to describe what ths flow sheet would remind me of as a refinery engineer.

I would describe it as a typical, complete, modern refinery as had been conceived in 1962. It has petrochemical operations, it is producing benzene,toluene and xylene. These operations are typical of virtually all United States refineries, producing somewhat more benzene, toluene and xylene that the typical United States refinery produces.

It is producing in the order of 5 to 5-1/2 per cent benzene, toluene and xylene whereas the typical, average United States refinery produces about 3 per cent benzene, toluene and xylene.

So in that I would characterize this essentially as a standard, modern fuel refinery producing the normal refinery fuel producgs in addition to these petrochemicals I have cited. These are heavy fuel oil, distillate oil or hearing oil and gasoline.

Q Would you explain to us what the difference is between that plant for a refinery outlined in the flow sheet attached to Plaintiff's Exhibit 215 and the project which Phillips actually undertook in Puerto Rico?

A The Phillips plant is sufficiently different, it doesn't really have a generic name like you call a refinery. This is a petrochemical plant and I suppose it is modeled after anything it is most closely after the

Sweeney Refinery or at least part of the Sweeney Refinery.

In the case of the Sweeney Refinery that is used to make the gasoline and petrochemicals and that is essentially what the core plant does, uses naphtha to make gasoline and petrochemicals.

Q What level approximately does the core plant produce in petrochemicals as distinguished from gasoline and fuel oil?

A In this case let me define the petrochemicals I have referring to and from this flow sheet here I define benzene, toluene and xylene or the $C_8$ aromatics as it is called and naphthalene. Those would be commonly referred 4o as petrochemicals.

In this flow sheet there is about 6-1/2 per cent of the crude oil charge recovered as those petrochemicals.

In the core plant the yield from core of similar petrochemicals, xylene, toluene and benzene, are in the order of 25 per cent. Probably the plant can produce more than that but in the forecast which I looked at part of those aromatics are going to gasoline because the forecast involved the stipulated quantity of gasoline contained in the quota agreement, 49.6 per cent of the core plant could produce roughly four times the volume of petrochemical yields, of the petrochemicals in this plant.

Q Mr. Moore, could you tell me when the Sweeney complex which you referred to a moment ago was built by Phillips Petroleum Company?

A The basic concept and initial design, it was build during World War Ii and the design made during World War II and the first part of the refinery built at the same time. The bulk probably was built shortly after World War II.

Q Would you describe the core facility asbeing basically similar in concept to the Sweeney Refinery?

A The concept of producing gasoline and petrochemicals from naphtha, that is the feedstock, was the basic conceptual philosophy of the original Sweeney design.

Q Mr. Moore, does the Sweeney facility to your knowledge also embrace the equivalent of the plant which was originally planned for core?

A The Sweeney Refinery today of course is quite a complex chemical plant and I think you could say fairly that if core were to have evolved with many satellite plants, it would probably --

MR. FARRELL: Could we have a time, as of when?

Q As of 1968 or as of 1962.

THE COURT: Tell him which one you want.

Q As of 1962, sir?

A 1962 would be more extensive than the core plant, not as it is today, but it would have been the core plant plus primarily an ethylene operation.

Q In terms of the downstream processing units which the plant had, is that correct?

A Yes.

Q Mr. Moore, do you know or what do you understand the term flexibility to mean as applied to a petroleum refinery

A A petroleum refinery designed for the United States always has one of its primary objectives flexibility.

When you say flexibility, what you're really talking about is the fact that in United States we have varying, seasonal variations. The demand for the main fuel we have for heating oil is in the winter, not so much in the summer.

There is less gasoline in the winter because in the summer people drive on vacation and use more. So there is a reduced demand for fuel oil to operate power plants in the winter because we don't air-condition.

So the character of the fuel product markets for petroleum in the United States is one of a changing pattern or demand.

So the refinery that is to meet that market has to have flexibility designed into it to make the gasoline yield relative to the heating oil and residual yield for industrial fuel oil yield, relative to both of those other things. Any refinery has as a major criteria flexibility.

Q Mr. Moore, what is a petrochemical feedstock produced from at a refinery?

A With the technology of today of 1962, -- well, let me qualify that a little bit.

In 1962 I would say virtually any refinery stream could be converted to some kind of petrochemicals.

Today, any refinery stream can and maybe it was the same in 1962, I just can't remember that.

But I think the distinction is not too critical because virtually any hydrocarbon can be produced into some kind of petrochemical. Each hydrocarbon whether heavy or light couldn't necessarily be turned into any petrochemical but if you take all of the possibilities of petrochemical and refinery feedstreams, each feedstream could be produced as some kind of petrochemical if the right kind of plant was built to process it.

Q Could you tell us what is necessary to make a petrochemical feedstock available from a refinery?

A A refinery has a petrochemical feedstock available as soon as it brings crude oil into the plant so there is virtually no equipment necessary to make pe5rochemical feedstocks available. Th[illegible]re almost available by definition in the operation of any refinery.

THE COURT: What I think he is asking you is does it go out of the refinery by pipe to the customer or barrel or gaseous or in what form? I think that is what the inquiry is intended to find out.

THE WITNESS: Let me readdress myself then.

First, you can find petrochemical feedstreams anywhere because virtually all refineries have petrochemical feedstreams. To make it available to he customer, the refiner might have to do nothing but he may have to build a tank for example or a loading dock. These things in terms of refinery cost are a relatively small investment. He would not have to build normally a processing plant to make petrochemical feedstocks available.

Q Mr. Moore, what would you understand flexibility to mean with regard to producing petrochemical feedstocks as distinguished from flexibility in a petroleum refinery?

A I suppose flexibility to produce petrochemical feedstocks would primarily mean having a lot of choices available. If you had a lot of different streams presumably one who wanted to make any particular che-ical could come to you and you could find a stream that would be suitable for him.

(Continued on next page.)

Q Would you describe the Phillips Core facility, the facility which Phillips actually constructed in Puerto Rico as having a high degree of flexibility with regard to producing petrochemical feedstocks?

A Well, compared to a refinery, of course, it had very small flexibility, because it had relatively few streams. It basically only processed naphtha which perhaps might be just called a single stream from crude oil, where crude oil produces many streams. So it would be relatively inflexible.

Q Mr. Moore, do you know what it means for a refinery to have the character of a quasi-public utility?

A Well, quasi-public utility, to my knowledge, doesn't have an exact meaning, but in recent years the idea has been sort of kicked around that perhaps you could finance a refinery by using certain utility concepts, and I think when used in this term, utility concept does have a pretty definite meaning to most people, and what it really means is that a market is assured, and the owner is assured a return on investment.

For example, a real public utility, you know, there is a regulatory agency and they say how much you can charge for electricity and how much you can charge is determined by what the regulatory agency says is a fair return on the investment.

So utility concept involves the notion of a guaranteed profit, but also, a guaranteed small profit.

So the idea has been advanced that perhaps an owner could go to a major customer and say, "If you will guarantee me a profit, I will build a plant and operate and provide you materials at low cost, because I will only take a small profit," because I'm trading off high profits for insurance, if you will.

Q Mr. Moore, in your opinion, does the Phillips Core facility embody either the public utility or quasi-public utility concept?

A Not to my knowledge.

Q And why not?

A Well, I'm not familiar with any idea wherein there is a guaranteed profit for Core or where Phillips has offered to reduce their profit in return for any kind of security, the assurance that they would make a profit. I think it is the normal commercial type of venture.

Q Mr. Moore, would it be possible for a small promotional group, interested in constructing a petrochemical facility, to arrange for the financing of the facility without securing specific prior contract commitments from chemical companies to purchase the products that they hoped to produce?

A Not normally, for this reason:

When someone goes to the bank to borrow money, as we all know the bank wants to know if you can pay it back. If you want to buy a car, the bank asks you how much you make, how much you have in the bank and whether you still have a job. They want to know if you can pay the money back.

And if a company goes to them they ask them the same questions. They are perhaps in slightly different form.

We normally don't keep a balance sheet at our house, but a company does keep a balance sheet which sort of shows how much money it saved. It has a profit and loss statement which kind of shows what its income is or it's like the company's salary.

So the bank says,"Can you pay this money back and particularly, can you pay the money back if the venture fails? If the whole things goes down the tubes, do you still have enough money to pay us so we don't have an unusual risk?"

That's the normal negotiation which has to go on before a loan is accepted.

Now, a small promotional group is normally considered one which doesn't have enough money to do what they're trying to do. They may have a lot of money. Maybe they're trying to do something that costs a whole lot, so they don't have the financial resources to accomplish the objective.

Now, one thing that a promotional group can do or that a bank will consider with a promotional group that a person doesn't have a chance to do is that the prmotional group may find a way to, in effect, get the financial resources of a big company behind them and they would do this.

For example, by assuring the bank that when they make the product there is going to be a big company around to buy it and they have a contract. So in essence, this will assure the bank that their only source of paying off the loan, which is successful operation of the business, has been insured by making big companies promise them through contracts to buy their products. So this adds assurance to the bank that they will be able to repay the loan with the earnings from the business.

Q Mr. Moore, in your opinion, could a company such as Phillips Petroleum Company undertake a project like Core without first securing such prior commitments?

A From the standpoint of the bank they could because they themselves have the financial resources to pay off that loan even if Core were to flop.

Q So that they would be able to proceed because of their financial resources?

A They would be able to proceed with an investment of that size, with their resources, yes.

Q Mr. Moore, I just have two more questions for you.

Are you being paid a fee for your time and work in preparing the study of the project about which you testified today?

A Yes, we are.

Q And is that fee comparable to the normal consulting fee which you received for comparable work for your regular clients?

A It is our standard fee plus expenses, yes, sir.

MR. UROWSKY: Thank you very much.

THE COURT: At this time I will exuse the jury briefly.

(Jury left the courtroom.)

THE COURT: Please mark for identification whatever the wtiness relied upon, and make it available to plaintiff's counsel.

(Recess.)

(Jury present.)

(Defendant's Exhibit D-341 was marked for identification.)

xxxxxx

CROSS EXAMINATION

BY MR. FARRELL:

Q Mr. Moore, I show you Defendant's Exhibit 341 and ask you if that is the projection to which you referred in your direct testimony?

A Yes; specifically the table called K-1 -- Core Complex in Puerto Rico.

Q On the bottom of that page is K-128; is that the page?

A Yes.

Q Is that the only projection you looked at in making this calculation?

A IT is the only one I used. I looked at the same one that Mr. Walker had looked at, which was the earlier one, I think presented in the presentation in Puerto Rico, but I didn't use that one.

Q Now, Mr. Walker -- I'm sorry, Mr. Moore -- you know Mr. Walker, don't you?

A Yes.

Q You know the firm of Purvin & Gertz?

A Yes.

Q You have a high regard for their work?

A Yes.

THE COURT: Can you all hear the witness?

THE WITNESS: I'm sorry. I nodded.

Yes.

Q Turning to 1967, at that time do you know what size Phillips Petroleum was relative to the other oil companies in the United States?

A Using what measure?

Q Assets.

A No, not from assets. Perhaps earnings, I could give a better estimate.

Q Give me earnings.

A Well, I would say in '67 Phillips' earnings were in the magnitude of 2 to 3 hundred million dollars a year, and they were probably ranged around eighth of total oil companies, eighth to tenth.

Q Was Phillips regarded in the industry at that time as a prudent investor?

A I would say that Phillips was regarded as an astute innovative investor. I don't know whether that is the same thing as prudent or not.

Q Astute innovator. Do you know whether Phillips in 1967 took into account the possibility that OPEC would be more effective?

A No, I don't.

Q Well, Mr. Walker in 1963 ---

A Moore.

Q -- and I show you Mr. Learned's letter of December 16, 1963, Phillips was projecting that this facility would earn annually $17,000,00, was it not?

A Yes, sir.

Q Now --

A I--

Q Do you want to add to that answer?

A I can't ask a question, can I? Sorry.

THE COURT: There is a good reason for that.

THE WITNESS: Yes, I know.

Q Do you know whether in 1967, in the oil industry, there was a general opinion on the part of those engaged in it that crude oil prices would be escalating sharply in the next few years?

A I would answer that this way:

In 1967, prior to the Six Day War, I suppose the philosophical position would be that they will, but not any time soon.

And I think my position was that the Six Day War focused on those issues which in fact culminated in the rise in crude prices.

Q You don't have any evidence, however, that after the Six Day War Phillips rethought this project, do you?

A I have never investigated that at all, no, sir.

Q There certainly was no evidence, anything external, that you could see, that they did?

A I didn't look for any.

Q Now, in fact, in the oil industry, in 1967, there was some opinion that prices would go down, isn't that true?

A I would say so. Again, prior to the war.

Q How about after the war?

A I think that that opinion was not held at that time.

THE COURT: When was the war?

THE WITNESS: In the fall of '67.

Q Well, are you aware that at about this time Commonwealth Refinery made a prospective two-year contract to sell refined products at the price that was then prevailing?

A I am. Are you talking about the Puerto Rican Water Authority contract?

Q I don't know to whom the seller was. Are you aware of that contract, there was a two year contract, was there not?

A I don't know the term of it, but there was a very famous contract made at that time which ultimately resulted in I think some litigation, and that was one with the Puerto Rican Water Authority, yes.

Q And that contract was fundamentally based on the opinion of Commonwealth that crude oil prices would not increase, isn't that correct?

A That's correct.

Q And that contract was a disaster, wasn't it?

A That's correct.

Q Were you aware or did you consider, did you consider that in 1968 the prices of refined products as well as the prices of crude oil might rise?

A Did I consider that in 1968 --

Q Did you consider that as of 1968 a prudent investor who thought that crude prices would increase would also consider that the end products would increase, the prices of the end products would increase?

A In the general sense, yes, and I qualify my answer, because the economics which would dictate how much of the more expensive oil in the United States and the less expensive oil overseas would be available to him would of course affect that answer and he would have to speculate on what the government policy was, which I think is pretty dangerous.

Q Well, I think you testified that the value of the import quota was somewhat speculative as of 1968 because it assumed that foreign crude prices would stay relatively stable and that the government would continue its import policy, isn't that correct?

A That is not what I said.

Q Tell me what you said.

A I said that because of the fundamental elements which determined the value of the import quota a prudent person would feel they had been unlikely to continue on indefinitely into the future, that there had to be an end to these particular conditions. And I think speculative, perhaps, is too strong a word for what I implied by that statement.

Q Well, again, do you know whether Phillips considered this?

A No, I have not ever discussed this kind of matter with Phillips, and I have no idea what their thinking was.

Q Well, you testified on your direct that a reasonably prudent investor would pay about $37,000,000 for this plant, is that correct?

A As of January, 1968, yes, sir.

Q And is it your testimony therefore, that Phillips would spend $70,000,000 to build a plant that was worth only 37?

A Yes.

Q That's what they did?

A That's correct, and I think events have borne out my analysis.

Q But that was not the opinion of a major oil company, namely PHillips, in 1968?

A I assume not. I certainly don't know what their opinion was.

Q And therefore, if you could find an oil company which would spend $70,000,000 to purchase a facility, that you say is worth $37,000,000, it is also reasonable to assume you could find a buyer for a minority interest in that core plant, isn't it?

A I'm sorry, rephrase the question, or restate it, excuse me.

Q If an oil company of the stature of Phillips would spend $70,000,000 to build a plant which you say was worth, when it was completed, $37,000,000, would it not be possible to find an investor who would agree that that plant was worth at least the $70,000,000 Phillips expended?

A My analysis, of course, was based on the value of that plant to produce profit in the future. $37,000,000 is perhaps below what someone might have bought the plant for salvage value.

So possibly if you were to salvage the plant, tear it down, move it to the United States, you could have found a buyer that would have paid more than $37,000,000. If the buyer looked at the plant in terms of its profit - producing potential, and he recognized that the profits would have to be plowed back in other plants for ten years, then I would not deviate in any way from what any investor might pay for the plant, based on my $37,000,000 estimate of the value

Q And in that case, then, Phillips had made a wrong judgment in building the plant, that is your conclusion?

THE COURT: Tested by 1967 judgment, is that what you're asking?

Q Yes. As of 1968 or '67, they were making a big mistake, is that your testimony?

A Considering all of the terms that went into the contract, I mean, into the deal, which mainly involved the contract with the government of Puerto Rico, yes, sir, they absolutely made a mistake.

Q As of '68?

A As of '68. No doubt about it.

Q Were you aware that this was going on in 1968?

A I had no idea they had to reinvest their profits, I was aware of the fact that they built the plant.

THE COURT: What is the date of the contract with the Commonwealth?

MR. MARKS: 1966.

MR. MacCRATE: 1965, your Honor, May.

THE WITNESS: '65, yes.

A No, I had only learned that when I took this assignment and I was shocked to learn that.

Q You recall, do you not, that in 1965 and in '64 there was tremendous opposition to granting this quota to Phillips?

A Yes, sir.

Q Based on your knwoledge of the industry at that time, do you believe that there were any other oil companies, other than Phillips, which would have expended the amount of money that Phillips expended to build a petrochemical facility in Puerto Rico?

A I would answer that this way:

I think that virtually any company who could afford it would have built the core plant and operated it if they didn't have to reinvest ten years' profits. I doubt that any other company was willing to make an agreement like that with the Puerto Rican government and I suspect that one of the reasons Phillips got the quota is that they uniquely were willing to make that agreement.

I must say, I don't know that of my own knowledge, but that would be my judgmnet in the matter.

Q Do you know how much -- I'm talking about percentages now -- do you know how much of its earnings Phillips normally plows back into reinvestment?

MR. UROWSKY: Objection, your Honor. Couldwe have some understanding, reinvestment as of what date?

THE COURT: The time ought to be fixed.

Q As of 1968.

THE COURT: You see, as I understand it, this was done in '65, isn't that so?

MR. FARRELL: I will take '65, your Honor. '65.

THE COURT: Everybody is talking about '67 and '68.

MR. FARRELL: Because that's when the plant got onstream, your Honor.

THE COURT: I know.

A My analysis is what would they have paid in '68.

THE COURT: He asked you the question. You answer the best you can.

A No, I haven't asked for PHillips' annual reports or their financial statements to say how much they invest, and, of course, those statments don't say necessarily what they invested in.

Q But it is normal, is it not, for major petroleum companies to reinvest their profits?

A To reinvest their profits in the best way possible at the time, yes.

Q Yes. And this reinvestment would normally be in plants and equipment for the continued operation of the oil company, wouldn't it?

A No.

Q What would it be?

A Buying leases for oil production, most likely, off shore oil production or onshore oil production, concessions overseas, filling stations, paying the bank, improving their debt equity ratio.

Q But all of that is designed to increase or to continue in operation the company's business, is it not?

A Under the most favorable terms it can manage, yes, sir.

Q Now, did you, when you considered your report, review the actual operating expenses and profits of the Core plant?

A Not when I did my report, no, sir.

Q Have you looked at them since?

A I looked at, briefly, some of them, yes, sir. '67, '8, '9, '70, '71, I think.

Q Did you look at '73 or '74?

A No, I did not.

Q When did the quota system effectively end?

A Well, I think the quota system legally ended in '73, but I think effectively crude prices were such it ended -- I mean the advantage probably disappeared about '72 some time.

Q Were you aware that in '73 and '74 the profits of the Core were higher than they had ever been during the quota?

MR. UROWSKY: Objection, your Honor.

THE COURT: I think we had the profits testified to yesterday, did we not?

A I would certainly assume they would be. Everyone else was making --

THE COURT: Just a moment. There was an objection. The Court has to have an opportunity to rule on it.

THE WITNESS: Excuse me.

THE COURT: I think there was testimony yesterday.

MR. MARKS: Mr. Johnstone testified.

THE COURT: I thought he did.

Please don't make an argument. I will overrule the objection.

THE WITNESS: Do you want to restate the question?

Q Yes, were you aware that in '73 and '74 the profits of the Core plant were higher than they had ever been during the quota?

A I would have assumed they would be, yes, sir.

Q Why would you assume they would be?

A Because in 1973 the products which they sold reached their all time price high. Benzene sold for $2 a gallon, which was almost ten times what it had sold in our projection. This came about because -- well, maybe I shouldn't -- you want me to go into that detail?

Q Sure, tell me.

A It came about because demand basically caught up with supply in the early 1970s. As you probably, well, as you may not be aware, there was really a hiatus or a ceasing of construction of petrochemical plants, and particularly refineries in the late '60s and early '70s up until this day, there have been virtually no refineries built.

This was --

THE COURT: You're talking about the United States, continental?

THE WITNESS: United States, yes, sir.

THE COURT: Not everywhere.

THE WITNESS: That's almost true everywhere. Let's say Europe and United States and Japan, I should say.

A So what happened, in 1973 there was fundamentally great concern about the fact that foreign crude prices were rising very rapidly, demand was very high, gasoline demand was very high in 1973 and basically industry ran out of aromatics, and CORECO, for example, the reason I say I would have assumed they would have made their best profits ever in '73 was that people who were in the aromatics business, that was their all time record year, because the demand was high. They could sell all they could make and the prices were the highest they ever were.

Q Are you aware that Phillips itself has projected that it will earn, that the Core will earn, from 10 to 15 million dollars per year through 1979?

A By the Core, you're talking about the original core plant?

Q Right.

A Yes, I'm aware of that.

Q And do you have any reason or any knowledge on which you would base any disagreement with that projection?

A With respect to the first element of the project, the core plant, no, I think that is reasonable.

Q 1969 and 1970 Phillips bought a quarter interest in core from PRIDCO, did it not?

A Yes, sir.

Q A 25 per cent interest?

A That is my understanding.

Q Do you know what the price was?

A $18 million, I believe.

Q Again, based upon your prior answer, you would have the opinion this was a bad investment for Phillips, is that correct, buying this share?

A If I could put myself in that time, I probably would have thought it was not a real good investment but not particularly bad.

Q Did you regard or do you regard the price as reasonable?

A Well, I think considering the nature of this transaction the price was more or less reasonable.

Q What do you mean by considering the nature of the transaction?

A Well, I think there were several factors that characterized the transaction.

The first factor was that by buying 25 per cent or by buying PRIDCO's 35 per dent, Phillips acquired managerial or economically two things, they bought 25 per cent of the earnings if you will or assets, this is something which they could put on the balance sheet, in the savings account and added to their earnings.

So they acquired it and that would be more or less a conventional kind of analysis.

But secondly they acquired something we might say is intangible but usually has a value, namely, it got rid of a minority stockholder. The management of Core did not have to protect the rights of a minority stockholder, they got some rreedom of action. That of course is very difficult to put a specific yardstick value on but it is customary valued, something of value that you pay money for.

I think the third characteristic of the transaction is that they were certainly not going to want to drive a hard bargain with the Puerto Rican Government which was, of course, very closely involved with PRIDCO. I felt it would be willing to pay a premium for the 25 per cent because they gained freedom of action and I think they were not willing to bargain particularly hard because it was the Puerto Rican Government.

Q Do you have any opinion as to the difference in price that might have been reached if it had not been PRIDCO?

A I made a guess at that. I said that perhaps a reasonable premium to pay for the freedom of action that you were acquiring the minority intterest and because once you acquired the 25 per cent interest, for accounting reasons there was some advantage and you could put it on the balance sheet which accountants think is important, these were the reasons and I guessed a 25 per cent premium woujld have accrued to what Phillips would have paid for just the earnings by itself.

If you take that kind of analysis, that would have reduced my calculation, it showed that there would have come back the value of Core of $57 million if I assumed they paid a 25 per cent premium for PRIECO's interest, multiplied by four, it comes to $58 million.

Q The cost of Core as of that date was $57 million?

A As measured by this transaction which of course is still less than the cost of the plant.

Q Are you aware what PRIDCO paid for its interest?

A I will say I have seen the numbers but I couldn't recall them.

Q If I said $3,750,000 would that ring a bell?

A $3,750,000?

Q Yes.

THE COURT: Is that in the record here somewhere?

MR. FARRELL: I want to find out if he knows.

THE COURT: He said he doesn't.

MR. FARRELL: I tried to refresh his recollection.

THE COURT: Is there any dispute? I won't waste time on it.

You may answer.

A I remember reading in the record somewhere it was proposed that if PRIDCO, I believe Mr. Walker's testimony, that if PRIDCO put up their portion of equity, of the original equity that was roughly 3-1/2 or 3-3/4 million that would be their 25 per cent of the original equity used to build Core, yes.

Q Do most operating oil and chemical companies use the time to payment analysis that you used?

A Time to pay out.

Q That you used?

A I think practically every oil company uses it to some degree, yes.

Q Do they rely more on the discounted cash flow method?

A For typical investments the discounted cash flow is more widely used by staff groups particularly.

Q Is the discounted cash flow method more sophisticated?

A Well, I can't answer that real briefly. If you don't mind let me elaborate a bit.

There is no magic way to evaluate an investment. Probably some of the smartest investors do it by the seat of their pants. Possibly J. Paul Getty doesn't know what a discounted cash flow method is but he does pretty well and really take the tools available and try to use them as best you can.

For many investment situations this discounted cash flow is probably recognized as the most effective technique.

I said I used the time to pay out because I thought there were some peculiar circumstances of this particular investment which made the time to pay out something I thought was a little bit more common sense and enabled me to get to the heart of the matter better.

Q Isn't the basic disagreement between you and Mr. Walker the way in which you value this ten-year reinvestment requirement?

A I would say the -- yes, the ten-year reinvestment requirement is basic or how we treat it is the fundamental difference between the analyses.

Q Mr. Walker treated it by increasing the discount, is that right?

A He said he would, the investor would require 17-1/2 per cent return where he might require 15 per cent return.

Q He considered it more important so that after you had calculated it you treated it separately, isn't that what you did?

A I did and I think I considered it important but also considered it pretty confusing. I didn't think that I of my own experience can sit here and say that if I were required to reinvest all profits for ten years, I don't think it is real clear what the impact of that would be on an investor.

THE COURT: Isn't it true that in addition to that commitment to reinvest for ten years there was also an exemption from income taxes on profits for ten years.

THE WITNESS: Yes.

THE COURT: One was in a way connected with the other, wasn't it?

THE WITNESS: Yes. In my view I am not sure what you are thinking about. In my view it was connected in that actually you had more money at stake, to reinvest and there just aren't that many opportunities in Puerto Rico.

2 Q Mr. Moore, as a matter of fact Phillips met the commitment to reinvest within the first year or two of the commencement of operations of Core, isn't that right?

A It certainly got a good start on it.

Are you talking about the fibers investment?

Q Yes.

A That certainly met all of the early commitments and got them ahead of the return criteria by it.

Q Thereafter the profits would not have been required to have been reinvested because they already met the commitment?

A Who by?

Q Was it not true that Phillips announced that it was going to invest the required amount in a fibers are plant?

A I don't really know but I understand, my understanding that that is about right.

Q If in fact Phillips met its obligation to reinvest within a year or two of the opening of Core, the Core profits would not thereafter be tied up, isn't that correct?

A The fact that Phillips had reinvested that money in one sense disencumbered the profits from the original Core plant but the total project was still very much -- there was not very much money in the bank, the money in the bank had gone down because they dropped $50 million or whatever it was on the Core plant, on the fibers plant in these two years. So they were losing money, cash hand over fist at this point.

Q On the other hand the profits themselves, assuming you have a minority interest and, as you testified you have to consider that if you had a minority interest the profits of Core itself were not encumbered by this agreement that you talked about, isn't that correct?

A I don't understand that --

MR. UROWSKY: Can we fix a time?

Objection.

Q In 1968 Phillips had announced they would meet the conditions of the agreement by billing the fibers plant, isn't that correct? That is what you said, isn't it?

A I said I don't have firsthand knowledge.

Q But it was about right you thought?

A I will tell you what I understand. Again, this is not firsthand knowledge.

THE COURT: Didn't you look at this agreement?

THE WITNESS: I looked at the agreement. I was not privy to all of the communications which went on about the fiber plant. I pointed this out, the fiber plant obviously was not a satellite of the Core, doesn't use the feedstocks from Core and so forth. It is a commercial venture that happens to be built across the road.

Q Didn't the agreement say they had to invest their money in satellites?

A Satellites or a project agreeable to EDA I think was the wording.

Q Wasn't this blessed as a satellite?

A That is what I say I have not seen. As far as I know there was correspondence between Phillips and EDA which asked that a fiber plant be considered, considered against this profit reinvestment so I think that my understanding is they reached agreement with the Government that they could count that as a reinvestment, yes.

Q The decision to invest in the fiber plant was a business decision by Phillips, isn't that correct?

A It would appear to be.

Q Under the agreement of 1965 Phillips having met the obligation to reinvest would have been able to utilize the profits of the Core in any manner it saw fit, is that not correct?

A Well, they did not meet the obligation. If you will examine my report you will see my projection of their obligation was over $300 million.

Q You weren't here testerday but where did you get the figure of $300 million?

A Off my report. I will refer you to that, if you would look at the report? If you look again at Table 7, the fourth line is called Core profit before income taxes, referring to the first Core plant.

You will see that my estimation of the core profits for the first year is 11 million, rising to 21, to 23, 25 and leveled out.

For ten years they hit roughly 24 million a year and for ten years that is $240 million plus the investment for the original Core plant which you have said is probably $70 million and that is $310 million.

Q As a matter of fact it hasn't worked out that way, has it?

A It seems like it worked out pretty close.

Q Do you know how much their actual profit reinvestment was pursuant to this agreement?

A I think the present commitment comes to about $200 million plus the original Core plant or $270 million which is pretty close. That is a fantastic amount of money.

Q In your analysis on return of money reinvested you assumed a return of 15 per cent?

A Yes, I presumed if you built a satellite plant that it would produce a cash flow equivalent to 15 per cent return.

Q If the money were reinvested would you not have some residual value? Wouldn't you have whatever the money was invested in?

A The physical assets?

Q Yes.

A Yes.

Q Wouldn't that be an asset?

A It wouldn't be a profit.

Q But it would be an asset?

A It wouldn't be cash. It wouldn't be an asset that you would consider paying the bank with, no. It is a factory sitting out there which may be worth salvage value or profit potential and I considered it worth a profit potential so I took the higher value.

On the balance sheet you show a plant that had a certain value or there was a debt against it. That wouldn't be part of your savings.

Q But the ten-year reinvestment feature was in your opinion an item which changed Phillips Puerto Rico Core as of 1968 to a losing investment, is that it?

A Yes, sir.

Q That is the only feature?

A Yes, sir.

MR. FARRELL: That is all I have, your Honor.

THE COURT: Anything else?

MR. UROWWKY: Just a few questions.

REDIRECT EXAMINATION

BY MR. UROWSKY:

Q Mr. Moore, why did you not use the projection pointed out for Core by Mr. Walker that he used?

A Well, I thought to be fair an investor in 1968 would probably have used the best market data available and the one I used was after the one Mr. Walker used. Actually it intends to use the profitability of Core if you use this number but I think it was fair.

Q Mr. Moore, do you know when Phillips actually began construction of the Core facility in Puerto Rico and thereby committed its investment?

A My impression is late 1966 or mid-1966.

Q Is it your opinion that conditions in the oil industry and particularly with respect to the relative price of foreign and domestic oil changed between 1966 and 1968?

A I think people's perception of what was going to happen to them changed, yes, sir.

Q Turning now from 1966 to 1969, when Phillips purchased the minority interest in Core which was held by PRIDCO for $18 million, at that time, sir, had the reinvestment obligation of the Core been satisfied independently by Phillips?

A From my recollection the investment they made in fibers at that time put them probably about even with their profits at that time. I don't think they were ahead, probably running about even in accordance with the contract.

Q But the construction of the fibers and the investment made by Phillips in fiber was credited as against the reinvestment commitment which Core was obliged to make with its profits?

A Again, I don't know that of my own knowledge. I have never seen documents which would support that.

MR. UROWSKY: Thank you very much.

THE COURT: Anything else?

MR. FARRELL: No, your Honor.

THE COURT: Thank you, you are excused.

(Witness excused.)

3 MR. UROWSKY: Your Honor, I call Roger Widmann as a witness at this trial.

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ROGER M. WIDMANN, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. UROWSKY:

Q Mr. Widmann, will you briefly outline your educational background at the university level, please?

A I am a graduate of Brown University 1961 and of Columbia Law School, 1964.

Q By whom were you employed after graduation from law school?

A The United States Securities and Exchange Commission, the SEC, a trial attorney.

Q What division of the SEC did you work in, please?

A I worked in two. In the reorganization section and in the enforcement section. Reorganization means dealing with bankruptcy matters.

Q What kind of work have you done since leaving the SEC, Mr. Widmann?

A I have been an investment banker.

Q Can you tell us have you worked in any specialized field within the investment banking industry?

A Yes, I have specialized in mergers and acquisitions and the corporate finance side of investment banking.

On the other hand, I have worked extensively in the venture capital side of investment bankking.

Q Can you tell us by whom you were employed in investment banking after you left the SEC?

A I was employed by New Court Securities Corporation.

Q During what period, please?

A From 1967 until 1975.

Q Are you presently employed by them, Mr. Widmann?

A No, I am not.

Q Mr. Widmann, what does New Court Securities engage in?

A It is involved, heavily involved in the venture capital business, corporate finance business including mergers and acquisitions and money management, portfolio management business.

Q Can you tell us very briefly what the background of New Court Securities is?

A New Court is a private investment banking firm owned by the Rothschild family and bank of Europe.

Q And can you tell us roughly the size of the venture capital fund that it manages?

A New Court is probably the largest or perhaps the second largest venture capital firm in the country, in the United States, and has a fund of about 60 to 65 million dollars, strictly for venture capital.

Q Can you tell us what the venture capital business is briefly, sir?

A Yes.

The venture capital business involves investing money from a fund such as the one that New Court has in a variety of different business enterprises and the object of that, of course, is to hope that funds invested will be greater in value when they are taken out than they were when they were put in.

Q Mr. Widmann, were you personally involved in the venture capital work of New Court Securities when you were employed there?

A Yes, I was.

Q And will you tell me how many companies New Court Securities has investments in?

A Approximately 40 different companies.

Q And can you give me some idea of the number of venture capital projects which were proposed in New

Court annually?

A Well, that would range from approximately 450, in one year, down to maybe a hundred in the worse year.

Q Mr. Widmann, can you tell me what your position at New Court was?

A Yes. I was the vice-president with responsibility for a number of our venture capital projects and with responsibility in the corporate finance merger and acquisition area as well.

Q Did you serve at any time as the chief financial officer of New Court?

A No.

Q Mr. Widmann --

A I was the senior officer in my department.

Q That is what I was inquiring about.

Mr. Widmann, in the course of your work as an officer at New Court Securities, were you personally approached and was the firm approached by promotional groups seeking financing for business ideas?

A Yes.

Q And were you engaged in an analysis and valuation of those proposed projects?

A Yes, I was.

Q And would you explain to his Honor and the members of the jury now what merger and acquisition work is?

MR. FARRELL: Excuse me.

Have you finished qualifying him?

MR. UROWSKY: No, I haven't.

THE COURT: Do you have any problem with his qualifications?

MR. FARRELL: I might want to ask him a few questiohs.

MR. UROWSKY: I think I can do this very briefly.

THE COURT: I don't have to have him explain what mergers are.

Q Mr. Widmann, in the course of your work at New Court Securities were you ever involved in the analysis and valuation in connection with an acquisition of a project, an industrial project on the scale of the Phillips Core project?

A Yes.

Q And would you tell us now by whom you are employed at the present time?

A An investment banking firm known as Donaldson, Lufkin and Jenrette.

Q And is Donaldson, Lufkin and Jenrette also engaged in the venture capital business?

A Yes.

Q And approximately what size is the venture capital fund?

A Donaldson's special fund is approximately the same size as New Court, about $65 million, and they also have investments in about 40 different companies.

Q And do you work in the venture capital area at Donaldson, Lufkin and Jenrette?

A Yes, both the venture capital area and the corporate finance area, as before.

Q Mr. Widmann, have you ever worked on the acquisition of an industrial facility in the petrochemical field?

A Not on a completed one. I am working on one now.

Q Approximately what size acquisition is under consideration in this case?

A A minimum of a hundred million-dollar sales company.

THE COURT: Excuse me, but if it is going to turn out to be confidential, I am going to strike that answer right now.

MR. UROWSKY: I think we ought to strike the answer.

THE COURT: Members of the jury will disregard the last two questions and answers.

Q Mr. Widmann, does venture capital work and mergers and acquisition work involve compensation of promoters and finders of business ideas and business opportunities?

A Yes, it does.

Q And are you familiar with the kinds of fees and other compensation which finders or promoters of business ideas receive?

A Generally, yes.

Q And on approximately how many occasions have you been involved in situations where finders or promoters of business -- where the fee of a finder or promoter of a business idea was determined?

A Well, I would have to say approximately once a month for the past eight years or roughly speaking 90 to a hundred times.

MR. UROWSKY: Your Honor, I submit that Mr. Widmann is qualified to give expert testimony concerning the practices which are observed in connection with private financings of business projects and the compensation accorded to finders and promoters of business ideas.

Would you like to ask some questions?

MR. FARRELL: Yes, I would.

THE COURT: You may have voir dire.

VOIR DIRE EXAMINATION

BY MR. FARRELL:

Q Mr. Widmann, when you were at New Court what did you do?

A I was vice-president of New Court and I was responsible for, on the one hand, evaluating venture capital investment opportunities as they were presented to us and putting them together, and persuading th firm to invest or not to invest in them, and on the other hand, acting as an investment banker in merger, acquisition and corporate finance areas.

Q Tell me what you mean by acting as an investment banker.

A That means putting together companies, having one company be purchased by another, acting on behalf of either the buyer or the seller, as part of that job, and another part of that job, of course, is finding financing, finding money for our clients, our corporate clients.

Q In your present position what do you do?

A Essentially the same thing.

Q Prior to this time have you ever worked in a petrochemical or an oil facility?

THE COURT: You see, I struck that out because I could hear it coming, that he was going to tell me the name of it was confidential. I told the jury you must disregard his testimony about it.

MR. FARRELL: He gave one. I was looking for a more general answer. I said "ever".

THE COURT: Oh, ever. All right.

Ever, other than the one that you apprently wouldn't want to tell us about because it is still pending.

MR. FARRELL: Yes.

2 A I misunderstood your question. No, if ever before this one, no.

MR. FARRELL: No further questions.

THE COURT: He may testify.

BY MR. UROWSKY:

Q Mr. Widmann, would you tell us how a typical venture capital financing or acquisition is initiated?

A Yes. Typically someone would come to a venture capital firm such as New Court or Donaldson and present them with the idea, which is in some form or other an idea which they would hope to make money with; that is the people who presented the idea and the investment banking firm. And the object of that meeting is to have the investment banking firm invest money behind that idea, in one form or another, either its own money or it would have to go out and get money from other sources, other institutions, normally.

Q Can you tell us what kinds of individuals or business organizations are typically involved in a venture capital financing?

A Yes. Typically you are involved with accountants, lawyers, other investment bankers, the principals of the deal, that is, the people who are the businessmen behind the idea, and frequently the finders or the promoters of it -- sometimes these things are all embodied in the same person or persons..

Q Would you explain to us what services, briefly, what services are performed by each of these individuals or business organizations in connection with a venture capital financing?

THE COURT: We are talking now about launching a new business enterprise, is that what we are talking about?

MR. UROWSKY: That's right, your Honor, or the acquisition.

THE COURT: You are talking about two different things, if you are going to inject acquisition into it.

Go ahead, frame your own question.

Q Mr. Widmann, is there a relationship between venture capital work and merger and acqusition work in terms of the kinds of individuals who are involved and the kinds of analyses which take place?

A Yes, it is an almost direct relationship. You are evaluating either for your own firm's account or for your client's account what an investment is all about, whether it makes sense for the client or for yourself, for whatever objects you have in mind, so you go through pretty much the same kind of analysis either way, and you use pretty much the same kind of people in the deal, and you would use an accountant obviously to tell you what this business ought to produce if it is a brand new one in the future, or what it has produced in the past accurately, if it is an existing business.

You would use lawyers, obviously, to help you in structuring the transaction and to get it completed in proper form.

You would use investment bankers in a whole variety of ways, but mostly related to evaluation of this business idea, what is it really worth, and to help finance it, get the money for it so it can go forward.

The finder, if I can run down the list of people who are normally involved, the finder-promoter is someone who is the catalyst. It was his idea to begin with, and that is generally what --

THE COURT: Is the finder the same thing as a promoter to you?

THE WITNESS: Yes, it is generally the same thing as a promoter. There is a very -- to distinguish them, I would say, would be a distinction without a difference. I can explain that if you wish.

THE COURT: No, that's all right. Mr. Urowsky will frame another question.

Q Would you explain to us the basis upon which each of the individuals whom you have just described as being typically involved in a venture capital financing is compensated for his services; on what basis, sir?

A Well, they are each compensated on a different basis, but they all relate to the same starting point, and that is it is a measure of how much they have contributed to the transaction, a certain logical underpinning as to how much each group gets paid.

An accountant, because he teakes no risk in this transaction, and the lawyer -- both of them get paid on typically an hourly basis, the hours they put in or the hours that they bill and those are the hours that they get paid for, no matter whether the transaction takes place or doesn't. They are hired for their professional skill.

Investment bankers have different skills and are compensated in different ways entirely. The investment banker's skill is in helping to structure the transaction, figuring out the best form for it, raising the money for it, persuading all kinds of people to go along with it and generally organizing it so that it does get closed, providing all kinds of financial advice along the way.

Their compensation, usually, the bulk of it is usually tied to whether the transaction actually gets closed. If it does, they get a fee which is like a-- commission, based on the size, the overall size of the transaction.

Finders also get paid for their ideas -- finders-promoters also get paid for their idea, and that, too, relates to their contribution to the entire effort.

Q Can you tell me if there is a relationship generally between the fee which an investment banker gets in a successful financing transaction of this kind and the fee which a finder or promoter gets?

A Yes, in rough terms there is.

Q Would you tell us what that relationship is, please?

A Well, let me step back just a second and explain it in terms of what an investment banker gets because a finder's fee is related generally to what an investment banker gets.

A finder also is compensated on a contingency basis, that is, if the deal gets done he gets paid. If it doesn't, neither he nor the investment banker gets paid.

An investment banker typically gets paid according to a formula which is called a 5-4-3-2-1 formula, which applies to transactions that are $10 million in size and less, and that formula works out so that on a 5 million-dollar transaction the investment banker would normally get paid $150,000.

On a 10 million-dollar transaction he would normally get paid $200,000. The greater in size the transaction, the less the percentage the investment banker gets, so that if he got paid for a 20 million-dollar transaction, he might well get the same $200,000 that he got for the 10 million-dollar transaction. That would be 1 per cent of 20 million dollars versus the 5-4-3-2-1 formula on 10 million dollars.

Basically the reason for that is that his contribution doesn't vary that much relative to the size of the transaction. You could put a lot of zeroes after that transaction, and he does pretty much the same kind of work, generally speaking.

Q Would you tell us how the compensation that an investment banker typically receives in this kind of transaction is related to the kind of fee or compensation which a promoter or finder receives?

A A promoter or finder generally receives relative to his contribution a fraction of that investment banking fee.

3 Q And would you explain to us why a finder or promoter, as compared to the investment banker, is compensated at that level by a fraction of what the investment banker's fee is?

A Yes. It is relative again to the contribution that each group makes. The investment banker, (a), is in this business for keeps. He has a large staff, a large overhead, a lot of expertise and normally a lot of credibility with all the people that he needs to have credibility. If he has to raise money, he has done this before. He has been to the insurance companies and borrowed money for other clients. He has been maybe to the public market and obtained money that way. He has been through all the private financial sources that normally investment bankers go to, and because of all these reasons, because of his staff, expertise, credibility, he gets paid a a fee which is a negotiated fee in all instances.

Q Does that fee vary according to negotiations from case to case?

A Yes, it does.

(Continued on next page.)

Q But is there any general range, for example, in a situation where the investment bankers' fee would be $200,000 which it might typically be under the 5-4-3-2-1 formula for a $10,000,000 or perhaps even $20,000,000 transaction; roughly what range of compensation for the finder would be customary?

A Well, generally you're talking about something in the neighborhood of 10 to 15 percent of what the investment banker got, and the reason for that, and there is a reason for that; it isn't you know made up out of whole cloth. It relates again to the relative contributions.

The finder, typically, and it can vary from one circumstance to another, and that's why this is imprecise, typically, he doesn't have much credibility compared to the investment banker or any other parties in the transaction, doesn't have any financial risk which the other parties might well have, including the investment banker, doesn't usually have any kind of staff, or antyhing like what the other parties have, and hasn't devoted or is unable to devote the same kind of time to it because it is an adjunct to his normal business or normal career.

He has come up with the spark, and he gets paid for that, but it is really in the nature of a tip, because it is that spark which let the whole thing get started,but it certainly isn't going to bring it to a conclusion.

Q And in absolute figures, in a typical transaction of $10,000,000, where the investment bankers' fee was $200,000, what range of compensation would customarily be awarded to a finder or promoter, in absolute dollar amounts?

A Well, in general terms, because it does vary --

Q Yes.

A In absolute dollar amounts, you would be talking about -- something in the 20 to as high as maybe $70,000 range.

Q Mr. Widmann, have you had occasion to read a transcript of the testimony of Mr. Rosenthal, who also testified at this trial?

A Yes, I have.

Q Are you aware that Mr. Rosenthal testified that in connection with a financing of approximately $60,000,000 face amount, a finder or promoter might receive a compensation, if it has to be placed in cash, of $14,000,000?

A Yes.

Q Mr. Widmann, are you aware of any instance in which the promoter of a project who provided no part of the financing, that is, who put up no money of his own, was awarded a cash fee of $14,000,000?

A Absolutely not.

Q In your opinion, and based on your experience at New Court and Donaldson, Lufkin, is a $14,000,000 fee a realistic compensation for a promoter who provided no money in connection with a financing?

A I have to say that that figure, that $14,000,000 figure, is absolutely incredible. I have never ever heard of any kind of figure like that for any kind of investment banking sort of service that could ever possibly be given. It is almost outside the realm of possibility. To give an example of that, even if you were generous, and in a major, major transaction, you were talking about giving a full one percent fee on a large transaction, well, and that $14,000,000 was one percent, that meant that your transaction would have to be $1,400,000,000 large, and that is simply not heard of, and I just don't know of anything like that.

Q Mr. Widmann, what is the largest fee that you are personally aware of which has been awareded to either a promoter or an investment banking firm in connection with an acquisition or venture financing of a facility comparable to Phillips Core?

A That I was personally involved in?

Q Yes sir.

A $700,000.

Q And would you tell us what that transaction was?

A Yes. That was the acquisition and financing of City Service Company, a chemical division, in Tampa, Florida by a French company, and that was a $60,000,000 transaction in 1973. The fee was $700,000, and totaled 700,000 was split between New Court, my firm, and Kuhn, Loeb, another investment banking firm.

THE COURT: This is where a French concern bought an existing plant in Florida?

THE WITNESS: That's right, and borrowed three-quarters of the money to buy it.

Q Mr. Widmann, can you tell us what services New Court provided to earn that fee?

A Yes. In the first instance, we helped the client every day negotiate the terms of the purchase from City Service, and that of course was a very complicated business.

We helped the client borrow money from three major U.S. insurance companies, $30,000,000. We helped the client borrow another $15,000,000 from City Service, negotiating with all of these parties all the time.

And finally, to add to even New Court's credibility, particularly with the insurance companies, we voluntarily, to benefit our client, asked Kuhn, Loeb, which is one of the world leaders in investment banking, to join us as partners in this transaction, and that's why they came in and that's why that fee was split, but that fee covered two firms over maybe a five-month -- well, at least a five-month period, five or six-month period.

Q Approximately how many people at New Court were engaged in full time or nearly full time work on that transaction over the five to six month period?

A Well, for the both firms it would have been 8 to 10.

Q Was there a promoter or finder involved in that transaction, Mr. Widmann?

A No.

Q IF there had been a promoter involved in that acquisition, can you estimate for us roughly the range of compensation which you would receive?

MR. FARRELL: Objection.

THE COURT: Does he have an opinion? He may state whether he has an opinion as to reasonable compensation.

A Yes. It would have been in the nature of $70,000.

THE COURT: A tenth of what the bankers got?

THE WITNESS: In that neighborhood, it could have been a little bit more, little bit less. It's hard to define hypothetically what services he would have contributed to the transaction.

CROSS EXAMINATION

BY MR. FARRELL:

Q Mr. Widmann, are you aware of any facts of this case?

A Yes, I am.

Q What did you read to become aware of it?

A I read -- well, that wasn't all. I read parts of the transcript.

Q Whatparts did you read?

A I read Mr. Rosenthal's testimony.

Q Did you read any of Mr. Shippee's testimony?

A No, I did not.

Q Did you read any of Mr. Willey's testimony?

A No.

Q Did you read any of Mr. Young's testimony?

A No.

Q Young, did you?

A No.

Q How about Mr. Diaz-Hernandez, did you read any of his testimony?

A No.

Q Did you read any of the exhibits? Did you read any of the exhibits?

A I believe, yes, I believe I read the Commonwealth Oil prospectus, which I believe is an exhibit.

Q Did you even read Exhibit 215, that was the brochure, did you read that?

A No.

Q Do you know whether Mr. Shippee or the Prudential Oil Company was a promoter or a finder?

A I don't know that.

Q You don't know that, do you?

A No.

Q And you've given us an opinion as to what kind of a fee he should get, haven't you?

A No, I haven't.

MR. UROWSKY: Objection, your Honor. This witness has not testified as to the fee --

THE COURT: The witness has answered that he hasn't given such opinion.

Q Well, were you aware, Mr. Widmann, that when Osca Chapman, the former Secretary of the Interior, received this brochure, Exhibit 215, from Mr. Shippee, he telephoned the president of Phillips Oil Company out of the blue and told him he could get an oil quota worth $22,000,000 a year; do you know that?

A No.

MR. UROWSKY: Objection.

THE COURT: Well, he's already answered it and I will let his answer stand.

Q Were you aware that prior to Mr. Shippee's coming on the scene, Prudential Oil's coming on the scene, Mr. Chapman had worked with Mr. Brown, a distinguished oil consultant and geologist, for six months to a year in attempting to --

MR. UROWSKY: Your HOnor, I'm going to object to this whole line of questioning. This witness has not testified as to facts of this case.

MR. FARRELL: Precisely.

MR. UROWSKY: If I may state my objection without interruption, your Honor.

He's only testified as to what customary practices are in this industry.

THE COURT: That I understand. However, the attorney cross examining him may pose assumed facts and ask the witness whether that would alter his estimate as to the value of the services, but this witness has testified already, he's read none of these materials. And you dont' have to be repetitious about it. Just so the record is clear, as I understand it, he read Mr. Rosenthal's testimony.

Is that right?

THE WITNESS: That's correct.

THE COURT: And he looked at the CORECO prospectus and that's all, is that right?

THE WITNESS: Yes. There may have been one other, somebody else's testimony that I read, but I don't recall his name.

THE COURT: Could you tell us please what it was?

THE WITNESS: I think it was Mr. Walker. Yes.

THE COURT: All right.

Q Are you familiar --

A And excuse me, I have just recalled, I also read the agreement between Phillips and the Puerto Rican government.

Q Mr. Widmann, assuming, assuming that Prudential Oil Company had brought a concept to Phillips Petroleum Company, and assuming that as part of this concept they sought to manage the proposed company, and assuming that as part of this proposed concept they wanted 27 percent of the equity, and assuming that Phillips knew that Prudential wanted 27 percent of the equity, and used the concepts, and assuming that through the use of these concepts Phillips was able to obtain a way, based upon price differentials for domestic and foreign oil, was worth 18 to 22 million dollars per year, would your opinion as to the compensation due to Prudential Oil be different from the opinion you just gave for a promoter or finder?

A Can I ask you some further questions about that, because those assumptions are not enough to really base an oipnion on.

Q What other assumptions would you want?

A I'd like to know what these people, the plaintiffs, contributed to this transaction as it went along. I mean, you have given me the assumption --

Q Well all right, we will assume that they worked with Phillips in meeting with Phillips, refining the concepts; that at a point, we will assume, it was pointed out that the regulations governing import quotas required Phillips to apply for the quota rather than Prudentia; and for that reason the application was filed in Phillips' name; does that change your opinion?

A But they still had no measurable financial risk and --

Q Assuming, let's assume further that the objective was to obtain the quota because once the quota had been obtained, the financial benefit would make the financing relatively simple. Therefore, up to the quota -- let's assume that up to the quota there was no appreciable expenditure by anyone except to pay lawyers and consultants.

A Yes, but after it was done, the money came from sources outside of the plaintiffs?

Q Yes.

A And they bore the risk of that investment.

Q Yes.

A Well, okay. Under those assumptions, all of them, as I interpret them, listening to them essentially for the first time, the activities that you have described would make those people finders or promoters entitled to a fee and probably at the highest end of what a finder-promoter would be entitled to, but they are not investment bankers, and they are not investors in this transaction, and that is where it leaves me.

MR. FARRELL: Nothing further.

THE COURT: Anything else for the witness?

MR. UROWSKY: I have just one question.

REDIRECT EXAMINATION

BY MR. UROWSKY:

Q Mr. Widmann, if you assume that this was a $60,000,000 transaction, what would the highest end of the promoter's fee in connection with a $60,000,000 financing be, in your opinion?

THE COURT: $60,000,000 plant.

Q In connection with a $60, 000,000 financing, where a promotional group had performed the maximum services of a promotional group, what would the highest end of the fee scale be, approximately?

A Well, the highest end of that fee scale would have to be something in the $125,000 neighborhood, give or take something.

MR. UROWSKY: Thank you very much.

THE COURT: Anything else?

MR. FARRELL: Yes.

RECROSS EXAMINATION

BY MR. FARRELL:

Q How old are you?

A 36 years old.

THE COURT: May he be excused?

MR. FARRELL: Yes.

THE COURT: All right, sir, you are excused.

(Witness excused.)

THE COURT: Would you counsel step up to the bench, please?

(At the side bar.)

THE COURT: What's next?

MR. MacCRATE: We have depositions to read, your Honor.

THE COURT: Can you accomplish anything in the five or ten minutes that are left for me?

MR. MacCRATE: I think it would be more productive if we just did it straight tomorrow morning.

THE COURT: All right.

Are you in agreement with that?

MR. FARRELL: I'm not sure what he has, but I think I am.

THE COURT: Why don't you take a few minutes then and check out with him, so if there are any problems that are going to arise, I can rule on them ahead of time. Will you do that?

MR. FARRELL: Sure.

THE COURT: All right. You may return to your seats, gentlemen.

(In open court.)

THE COURT: Members of the jury, I don't think it is premature for me to express my thanks and appreciation for your promptness and attendance here and your attention that you have given throughout the time we have been together. We are making greater progress than perhaps you think.

Now, tomorrow we are going to begin at 10 a.m., and we have a rather unusual scheduling problem tomorrow because the Chief Judge of the Circuit Court of Appeals has directed me to participate in a three-judge court in another matter, and so I will befinishing with you by about 2:15. So at that point in the day you will be finished for the day.

Kindly plan your schedules accordingly. We will start at 10 a.m. tomorrow. You may now withdraw from the courtroom.

(Jury left the courtroom.)

(Discussion off the record.)

(Adjourned to January 22, 1976 at 10 a.m.)

PRUDENTIAL OIL CORPORATION,

against 67 Civ 3748

PHILLIPS PETROLEUM COMPANY

January 22, 1976
10:10 a.m.

- - -

(In open court - jury present.)

THE COURT: Good morning, members of the jury.

Mr. Rigney, you may go forward.

MR. RIGNEY: Your Honor, at this time I would like to read certain portions of four depositions that have been taken in this action.

I'd like to hand up to you sets of these depositions with the documents that I intend to read from.

Your Honor, I would first propose to read from the deposition of Mr. Shippee, beginning on page 142, line 9. That is the deposition of October, 1967. I believe your Honor has a copy of that on the bench.

MR. FARRELL: Your Honor, we object to this for the reasons we advanced yesterday.

THE COURT: I will permit it to be read without prejudice to your rights to recall Mr. Shippee in rebuttal.

MR. FARRELL: But then your Honor, we want him to read the entire section, through page 148.

THE COURT: Let me see which pages are involved.

What page are you beginning at?

MR. FARRELL: 142, your HOnor. We would propose that they read to line 10 of page 146, and then again page 147, line 10 to the end of that session, which page 148, line 13 or 14.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: I will permit Mr. Rigney to read at this time and I will allow you to read the additional pages to the extent admissible immediately following his reading. I won't require him to read it, but you can read it as soon as he finishes Mr. Shippee's deposition.

MR. FARRELL: Thank you, your Honor.

MR. RIGNEY: Your HOnor, I'm beginning at line 9, page 142:

"Q Can you tell us the circumstances under which you came to make this visit to Puerto Rico at the end of November, 1962?

"A We had identified in our minds a new direction which would in our minds create the possibility of success. The first step was to confer with EDA to have a community of acceptance of this new direction, and that was the main purpose of our visit.

"Q When you speak about this new direction, you are speaking about a project with a gasoline feedstock, is that correct?

"A No, that is not correct.

"Q I may have misunderstood your earlier description of your new concept.

"A The new concept was simply a recognition that you cannot get chemical companies to make commitments in order to have so-called back-to-back contracts to build a refinery, that you have to build a core plant refinery, which will subsequently supply chemical feedstocks, and in the meantime it has got to run. Even though it is a petrochemical refinery, until it has chemical customers it is a gasoline refinery. We had to have agreement from EDA, since the last thing they needed was an additional gasoline refinery -- they had two -- that until the satellite plants were in being, in effect for the first few years, this would essentially be another gasoline refinery. And there was no other way to attack the problem. They concurred after getting an independent opinion from A. D. Little."

Your Honor, that concluded my reading.

THE COURT: I will now permit Mr. Farrell to read.

BY MR. FARRELL:

"Q When you refer to a gasoline refinery, you refer to a refinery that takes crude oil and refines it?

"A Crude oil or naphtha or whatever, because naphtha had been discussed by Brown and crude oil by others. Whatever degree, whether it was crude oil or some semi-refined oil, the end product would essentially be forms of fuel oil, not forms of petrochemical feedstocks. The petrochemical feedstock refinery, when it is fully preoccupied with chemical feedstock, still produces a lot of fuel oil, including gasoline.

"Q But the concept with which you went to Puerto Rico in November, 1962, involved the purchase of crude oil and its refinement in this refinery, is that correct?

"A It is not correct as to emphasis. The purpose of the trip was to recognize that the cart followed the horse.

"Q I think we have gone through that quite a bit, Mr. Shippee, and maybe we can come to grips with the problem in this way:

"Just what was the concept for the particular type of refinery that you took with you to Puerto Rico, what was to be its production? What did you view as its end products?

"A The end products were to be chemical feedstocks, and the recognition was that it would take several years to bring the chemical companies in there, and in the meantime it was going to be essentially an oil refinery, and we had to have their approval, that there would be a ten-year start-up on this thing before it reached what was hoped to be or represented to be the initial goal. The initial goal would follow, but it could not begin. It had to follow.

"Q You say ultimately there were to be chemical feedstocks. Before you got to that position you say that it was essentially refining fuels, fules would be the product of the refinery.

"What I am asking you is, what were to be the fuel products that would be produced by this refinery in the early years of operation?

"A It was not material to the concept. What was material is the --

"Q I am not asking what was material.

"A Excuse me. Let me answer the question, if I can help you.

"Q But you are not answering the question. I was asking, what were the products that you proposed would be produced during this period before you got to the point of producing chemical feedstocks?

"A We did not propose what products would be produced. We proposed that he recognize that you could not get firm commitments from Monsanto, from Hercules, from other chemical companies, to come down and start a chemical industry as a condition to organizing refineries. You had to organize a core plant and then build satellites. It was completely to that concept that the horse came first and the cart would follow, that you could not put the cart on the back of the horse and they start together.

"Q What I'm trying to talk about, is the horse."

THE COURT: You can omit the colloquy.

MR. FARRELL: I will omit the colloquy:

"A I understand your question and it was not the discussion."

I will omit the colloquy.

To 147, line 10:

"Q What were you going to say you did not have in hand, Mr. Shippee?

"A The technical processing study of a chemical or oil plant. We did not discuss, other than the origin of Venezuelan production, the raw material or the products to be produced from it. We merely presented to him what we considered an impasse, because we had met with chemical companies, because no one had been successful to date in the interest of chemcial companies to make commitments. We presented to him what we considered the fallacy of trying to start with chemical comapny commitments and told him that if we approached it, that it would take ten years, and the first year theremay be no chemical companies and the second year there may be a couple, but by the end of ten years we would reach his goal.

"If we started on the basis of a quasi-public utility operating from a core plant designed to produce these feedstocks, the core plant would operate in the meantime on whatever operation, but the goal would be to build the satellite plants around it. This was purely conceptual. It was accepted in principle, subject to study by A.D. Little. No discussion of what form of input or what products would flow. It was merely a recognition that it would take several years to reach the goal. It wouldn't begin together."

MR. RIGNEY: Your Honor, I will now proceed to read the deposition of Walter Norton, the first set of material I handed to you. I will begin at page 3, line 17:

"Q Will you state briefly your employment history?

"A I worked for General Electric for a period of 11 years during which time I was on loan from General Electric to the Manhattan project from 1942 until about March of 1946. I was on loan to the Kelex Corporation which built the Manhattan project, the atomic bomb plant at Oak Rdige.

"Q What did you do after March 1946?

"A I joined the group that I had met during the Manhattan project. The company name was Hydrocarbon Research, Inc., 115 Broadway, New York. I was with them for a period of 13 years, being vice-president for five.

"I then joined Arthur D. Little in 1959 as director of international activities and remained In that assignment until June of 1966.

"I became president of the Dorco Division of Dorr-Oliver, Stamford, Connecticut. I left that assignment in December 1968 and I started my consulting business, Joshua Norton & Company, in Cooperstown, New York as of that date and have continued since."

I now turn to page 5, line 6:

"Q What is the nature of the business of Hydrocarbon Research?

"A Hydrocarbon Research was the design, construction and development arm in the petrochemical, gas, petrochemical and cold gasification and air separation, liquification industry.

"Q What were the nature of your functions at Hydrocarbon Research, Inc.?

"A During the period I was there I had many. I was in charge of all procurement, scheduling, project management and then became vice-president of sales and project management.

"Q During the period you were with Hydrocarbon Research, Inc. were you involved in the engineering or construction of any refinery project?

"A Oh, yes. I was involved in a number of ways but primarily not on the design phase but on the implementation phase.

"Q Have you or any member of your family ever had any association with plaintiff in this action, Prudential Oil Corporation?

"A No, other than while I was with Arthur D. Little.

"Q Have you or any member of your family ever had any association with the defendant in this action, Phillips Petroleum Company?

"A I realize my wife is a small stockholder. I think she has 150 shares. I have had no relation other than the business nature but while I was with Dorr-Oliver I did have relations with Phillips in Florida.

"Q What was the nature of that relation?

"A We were designing a plant that Phillips wanted for a extraction of phosphate ore.

"Q Was Dorr-Oliver employed directly by Phillips in that connection when you were with it at the time?

"A Yes.

"Q Will you state for the record the nature of the business in which Arthur D. Little was engaged during the period 1962 to 1963?

"A Arthur D. Little was one of the leading consulting firms, management and technical consulting firms in the United States, having at that time approximately 1300 people in its employ.

"Q Where were you stationed with Arthur D. Little in 1962, 1963?

"A At Acorn Park, Cambridge, Massachusetts, the headquarters of Arthur D. Little.

"Q What was your position at Arthur D. Little in 1962, 1963?

"A I entered as director of international activities and remained in that function through the period of my employment.

"Q What duties did you have as director of international activities for Arthur D. Little?

"A My primary duty was in the business development of client contact for consulting assignments but in addition I did administrative functions.

"Arthur D. Little at the time I joined them had an office in Puerto Rico where they were undertaking work for the Commonwealth of Puerto Rico through .the Economic Development Administration and I was responsible for the functioning of that office."

Now turning to page 8, line 2, your Honor.

"Q In connection with your business development activities did you have any area of specialization?

"A Yes, I was brought in on professional assignments when some of my knowledge was of value. My knowledge was particularly in the petroleum and petrochemical field, confined largely to economic and marketing phases of the activity."

Your Honor, turning to page 11 near the bottom, line 23:

"Q I show you a two-page document dated December 28, 1962 that has previously been marked D-119 for identification and ask you if you can identify that document?

"A Yes. I recognize this as a letter jointly to me and to one James T. Jensen who was a professional in the industrial evaluation section of the chemical division of Arthur D. Little.

"Q Did you receive a document of which this is a copy or a similar document at or about December 28, 1962?

"A Yes, to the best of my knowledge I did."

Your Honor, at this time I would offer D-119 in evidence and ask that I read it to the jury.

MR. FARRELL: Let me see it.

MR. RIGNEY: I believe it is in the pile of documents I left with your deposition, your Honor.

MR. FARRELL: Objection, your Honor.

THE COURT: I will take the basis for the objection at the side bar.

(At the side bar.)

MR. FARRELL: Your Honor, it is hearsay.

THE COURT: All I have is page 2 anyway.

(Exhibit handed to Court.)

THE COURT: What is it offered to show, Mr. Rigney?

MR. RIGNEY: It is offered to show the nature of the evaluation which Arthur D. Little as consultants to the EDA was asked to make of the present project at a very early phase in its development.

This document includes a statement by Mr. Young which I think would entitle us to introduce it in any event as an admission. The context is admissible further under the business records rule which I think has been given a full scope and proper scope under the new Federal Rules of Evidence. This is an inherently truthworthy document and I think the proper argument directed to it should be to wait but it should not be excluded.

THE COURT: Who is the author of the memorandum, Mr. Norton?

MR. RIGNEY: Mr. Norton and Mr. Jensen jointly made the memorandum.

THE COURT: Is that really so?

MR. FARRELL: This is to Norton.

THE COURT: May I see the deposition, you are reading, please? Where does he mention this exhibit number?

MR. RIGNEY: Beginning at page 11, line 23. It is referred to by pretrial number but it in fact an exhibit we have marked in the pretrial order as D-119.

THE COURT: I am inclined to sustain the objection to it, Mr. Rigney. I also see very little relevance and it is already testified to as to the relation with Arthur D. Little.

If this were Norton's memorandum I would take it but it is not on the theory Norton could be cross-examined.

MR. RIGNEY: Your Honor, I would assent to that without waiver of our position that a document such as this is properly admissible.

THE COURT: All right, objection sustained.

(Continued on next page.)

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(In open court.)

MR. RIGNEY: Your Honor, turning next to page 17, line 5:

"Q Did you attend a meeting in New York at the New York office of Arthur D. Little on January 4, 1963?

"A Yes, I did.

"Q Can you tell me who else was present at that meeting?

"A There were three representatives of the Prudential Oil Corporation. One was Mr. Nathan Shippee. Another was Mr. Tom Young who at that time I believe was a vice president of Houston CHemical who represented himself as an investor and as a technical project manager for Prudential and a representative of one of the Wall Stree houses that were interested in the project.

"Q Would that have been Donald Blinken from E. M. Warburg?

"A Yes. For EDA, the representative was Mr. Ivan Irizarry, who was assistant manager of the New York office of EDA; Mr. Jensen of Arthur D. Little, and myself.

"Q I show you a document dated January 10, 1963, that has previously been marked Defendant's Exhibit D-125 for identification, and ask if you can identify that document.

"A Yes. I identify the document as a copy of that one that I received.

"Q Did you participate in any way in the preparation of that document?

"A Yes. It is customary inall meetings held by EDA attended by Arthur D. Little, where one or more members are present, that each take his own, separate note or notes and each compare notes in the preparation of the one document that then reflected the substance of that meeting.

"Q Did you in fact incorporate your notes into the preparation of Defendant's Exhibit 125?

"A Yes."

Your Honor, I offer in evidence Defendant's Exhibit D-125.

MR. FARRELL: No objection, your Honor.

THE COURT: It will be received in evidence.

(Exhibit D-125 was received in evidence.)

MR. RIGNEY: I'd like to read Exhibit D-125 to the jury.

THE COURT: All right.

(Mr. Rigney read from Exhibit D-125 in evidence, to the jury.)

MR. RIGNEY: Your Honor, I would now continue to read from the deposition which reports on this meeting as described at the deposition, line 17:

"Q Would you describe to the best of your recollection what happened at the January 4, 1963 meeting?

"A Mr. Ivan Irizarry opened the meeting by telling all members that the meeting had been called by EDA for the purpose of introducing Prudential Oil Corporation to Arthur D. Little and to outline the interests by EDA in receiving a report on the project proposed by Prudential to EDA.

"He stated in the meeting that Prudential had agreed that the report would be paid for by Prudential, but the substance of the work done by Arthur D. Little would be reported to EDA and that EDA would then decide whether copies were to be made available to other parties in the meeting.

"Q Did Mr. Irizarry say anything else during the course of the meeting?

"A He had many comments regarding the role which EDA would play in trying to obtain additional import quota for the petroleum products that would be brought into this refinery and joined in the general discussion throughout the meeting.

"Q What else was said during the course of the meeting?

"A Are you limiting this to Mr. Irizarry?

"Q No.

"Norton

"A Mr. Nathan Shippee took charge of the Prudential Oil Corporation's presentation, I guess is the way to put it, and he reliedon Mr. Tom Young to add the few comments that were added regarding the technical phases of the project.

"Mr. Shippee mentioned that he and his associates had been interested in this refinery since an approach was made to him either directly or indirectly by Mr. Oscar Chapman. Mr. Tom Young recited during the meeting that two preliminary -- no, three, I guess, three preliminary technical evaluations loosely used had been made; two by Universal Oil Products and one by Ralph M. Parsons Company.

"The documents were not presented to Arthur D. Little for review. They were merely mentioned in passing.

"IT was stated that this proposed refinery would be petrochemically-oriented as contrasted to a normal petroleum refinery. There was one comment made by Mr. Irizarry to the effect that a third refinery was needed because the two present oil-petroleum refineries in Puerto Rico were not equipped to provide the petrochemical feedstocks that were needed for a major petrochemical effort in Puerto Rico.

"One point that Mr. Irizarry made and was agreed to by Mr. Shippee was that any petrochemical-based refinery would be located outside of the San Juan area, because it was the desire of EDA to develop other parts of the island to a degree that they had not been developed and they felt that such a petrochemical-based refinery could attract industry, more people, and start a new complex on the island.

"Q Do you have any further recollection of what was said at the meeting?

"A May I state that my recollection is included in theis memorandum of January 10, D-125.

"Q Well, I would like to establish first of all whether you have any recollection independent of that document, beyond which you have already just set forth.

"A Yes. Arthur D. Little was asked if it would be interested in undertaking a study jointly for EDA and Prudential, and we tried to come to grips with what type of study was contemplated. There seemed to be a difference of agree between EDA and Prudential Oil Company as to the scope of what Arthur D. Little was going to be asked to do. My impression was that Prudential Oil Company wanted Arthur D. Little to do a perfunctory evaluation of the economic and marketing potential of the project, and that EDA wanted Arthur D. Little to undertake a more serious in depth evaluation of the technical and economic feasibility of the project, in addition to the potential for marketing, the potential for starting up a new industrial area.

"Q Do I understand from that answer, that it was your understanding that EDA desired that your study include marketing considerations?

"A Definitely.

"Q Was there any resolution of the difference that you have just described, concerning the scope of the proposed report reached at the January 4, 1963 meeting?

"A No, it was not reached. The difference in an approach from both parties was never resolved in the meeting and we left with the feeling that this would have to be resolved otherwise.

"Q In your description of the meeting, you mentioned that the proposed refinery was described to you as one that would be petrochemically-oriented.

"A Yes.

"Q I believe that term was used by Mr. Shippee in connection with is presentation, is that correct?

"A That is correct.

"Q How was the concept 'petrochemically-oriented' defined during that meeting?

"A WEll, from my prior experience, the impression that I obtained was that this was typical of a feedstock or as the word was used, core refinery concept. This briefly is the use of a refinery to produce products for the use of others, third parties, in the preparation of petrochemicals and chemicals, not an uncommon approach.

"Q Do you have any further recolection of what occurred at the January 4th meeting?

"A The meeting closed on the note that Mr. Shippee was going to get in touch with the head of the New York office of EDA, Mr. Diaz-Hernandez, and they were to agree upon a date to meet with the Department of the Interior for Oil Import Board in Washington and that after the meeting they would be back in touch with Arthur D. Little, both parties, EDA and Prudential Oil, to discuss further what our assignment would be, if any.

"Q Was Arthur D. Little to do anything at the close of the meeting?

"A Arthur D. Little was asked to write a note expressing our interest in pursuing this joint project for EDA and Prudential.

"Q Do you have any further recollection of the January 4th meeting?

"A No."

Your Honor, turning to page 34 at the bottom of the page --

MR. FARRELL: Your Honor, I had asked Mr. Rigney to read page 27, line 7 through line 28. If he would read it now or have me read it later?

THE COURT: The exhibit number 238?

MR. FARRELL: It is not yet marked and I have a copy here.

THE COURT: I will permit you to read it later. Mr. Rigney can go ahead ahead and then you may read.

MR. RIGNEY: I will read the bottom of page 34, line 25:

"Q I show you a document which has been previously marked D-128 for identification. It is a memorandum on Arthur D. Little stationery, dated March 5, 1963, with a notation 'Dictated March 1, 1963.'

"Can you identify that document?

"A Yes, I identify this as prepared by me.

"Q When was it prepared by you?

"A Since it was dictated March 1st I would assume that day.

"Q Can you identify the signature in the lower lefthand corner of that document?

"A Yes, that is my secretary's signature."

Your Honor, at this time I offer in evidence D-128.

MR. FARRELL: Objection, your Honor.

THE COURT: What is the basis for the objection?

MR. FARRELL: Your Honor, it is hearsay.

THE COURT: Overruled on that ground.

MR. FARRELL: May I approach the bench?

THE COURT: Yes.

(At the side bar.)

MR. FARRELL: We object to the third paragraph. The third paragraph is totally a hearsay statement by a member of the Economic Development Administration which was not in our presence, in no way relevant as to what Mr. Irizarry thought at that time of Prudential. This is simply an offhand comment which the defendant --

THE COURT: I see no hearsay exception to it because the author of this memorandum was available to you for cross-examination. But the real problem with that paragraph is I don't see what it has to do with this trial.

MR. MARKS: This is stating a conversation Mr. Norton had with Mr. Irizarry. Mr. Norton is reporting what Mr. Irizarry told him. Mr. Irizarry has never been examined. The only reason they are using it is it is prejudicial hearsay.

THE COURT: It looks irrelevant to me.

MR. MARKS: I think it is.

THE COURT: Since these people were asked to do something for Prudential and they were talking in discharge of their limited agency, even though they were never retained, what they ascertained probably would be admissible but this is already in the record.

MR. RIGNEY: Your Honor, I tried to limit and will further limit it and we do think it is material for the reason or placing the view of EDA by a qualified person with regard to this project and its alleged concept.

THE COURT: Didn't you depose Irizarry?

MR. RIGNEY: As far as I know we didn't depose him but Norton was there and subject to cross-examination and they were working together under the limited authorization by Prudential but never reduced to an agreement to evaluate this project and since the concept lies at the heart of the case we have a right to produce what was said about the project at the time. I think it is a material statement.

MR. FARRELL: It is not only immaterial but the fact that Norton was available for cross-examination doesn't remove the problem here. The problem was did

Norton cross-examine Irizarry as to why he made the comment and possibly had done anything to rebut it.

THE COURT: It is not taken for the truth of the material but the fact that Irizarry told him that and I will overrule the objection.

(In open court.)

THE COURT: Before this exhibit is read I want to instruct the jury that those portions of Mr. Norton's memorandum where he says what Mr. Irizarry said something, what Mr. Irizarry said is not evidence of the truth of what was said, merely the fact that Mr. Irizarry allegedly told it to Mr. Norton at or about the time reported in the memorandum.

MR. RIGNEY: The memorandum is dictated March 1, 1963, dated March 5, 1963 and the subject is "Prudential Oil Corp. - EDA - Puerto Rico."

(Exhibit read from.)

MR. RIGNEY: Now, your Honor, beginning on page 35, line 13:

"Q Did you have one or more telephone conversations with Nathan Shippee during the week prior to March 5, 1963?

"A Yes. He called me twice during the week preceding March 1, 1963 to tell me of the progress or lack thereof on the project.

"Q Will you state to the best of your recoll-ction what was said during those two telephone conversations starting with the first one?

"A Well, he reported that EDA were insistent that the refinery be able to provide at least or about 70 per cent of the fuel oil component at petrochemical streams or streams for the use and preparation of the petrochemicals and he said that it was necessary that a third opinion be given concerning the viability of such a project to be of help in discussions with both EDA and with the Oil Import Board. Jensen and another professional by the name of James Bradley and I had a conversation, probably a meeting together, to discuss what his objective was, and we came away with the feeling that this was probably too difficult to be done and that we should write to Mr. -- that I should write to Mr. Nathan Shippee to tell him that we had no further ideas or concepts that would be useful in pursuing this particular approach."

MR. FARRELL: I object to any further answer being read as not responsive to the question. It is cumulative.

THE COURT: It is probably cumulative so I will sustain an objection relating to the balance of page

36.

MR. RIGNEY: Your Honor, I would propose to read now page 37, line 18:

"Q Does the memorandum that has been marked" --

MR. FARRELL: That has been admitted in evidence.

THE COURT: Yes, it's accuracy may be inferred.

MR. RIGNEY: Your Honor, turning to page 40 --

MR. FARRELL: Your Honor, at this time I would just like to note that we wanted page 38, line 7 and the following read.

THE COURT: You can read it after he finishes unless it is clear that failure to permit you to interrupt and read would in fairness prevent you from putting in some part which ought to be done.

MR. FARRELL: In particular page 38 refers directly to the conversation about which Mr. Norton has just been asked and if you start at line 8 through 23 it refers to the conversation with Messes. Jensen, Bradley, which he referred to on the top of page 36.

THE COURT: I will permit you to read that later on.

MR. RIGNEY: Page 40, your Honor, line 22:

"Q Subsequent to March 5, 1963 did you have any communication with representatives of Prudential concerning the project that had been discussed at the January 4, 1963 meeting?

"A No.

"Q Did you have any communications with representatives of EDA concerning that project?

"A Yes.

"Q Will you describe those conversations or communications?"

MR. FARRELL: Objection, your Honor.

THE COURT: For the present I will sustain the objection and hear argument later on if you persist in offering it.

MR. RIGNEY: Yes, your Honor.

2 THE COURT: I assume the objection only carries to page 42, line 4?

MR. FARRELL: It carries to, your Honor, unless he starts to read page 42, line 8, we would object again. The objection carries through.

THE COURT: All right.

MR. RIGNEY: Your Honor, I would next read beginning at page 45, line 15:

"Q Did Arthur D. Little ever give to the Puerto Rican Economic Development Administration a technical endorsement of Prudential's proposals for a new Puerto Rican refinery?

"A No.

"Q Did Arthur D. Little ever give to the Puerto Rican Economic Deveoopment Administration an approval in any form of the Prudential proposals for a new Puerto Rican Refinery?

"A No.

"Q Mr. Shippee testified at pages 142 and 143 of the transcript" --

MR. FARRELL: I object to this. This is the same material he already read and it is improper examination.

MR. RIGNEY: If the matters are admitted in evidence this morning, I don't know, the force of his objection is if it is already now in evidence at this trial --

MR. FARRELL: It is cumulative and an improper way of questioning this witness.

THE COURT: It is a little late to complain about the form of the question, is it not? I think it is already before the Court. If I am mistaken I will hear Mr. Rigney when he finishes.

MR. RIGNEY: May I proceed?

THE COURT: All right.

MR. RIGNEY: "Q Mr. Shippee testified at pages 142 and 143 of the transcript --"

THE COURT: I intended to sustain the objection on that. If you wish to be heard at the side bar you may.

MR. RIGNEY: Excuse me, I misunderstood.

THE COURT: My ruling does not extend to the bottom of the page 46, line 23.

MR. RIGNEY: I will then begin to read at that point.

MR. RIGNEY: "Q Did Arthur D. Little ever give EDA an opinion concerning the subject matter of that?

"A If any opinion were offered it would have been an off the cuff verbal opinion. There as nothing in writing to either EDA or to Prudential.

"Q When you say 'an off the cuff verbal opinion' to what are you referring?

"A Some one of the participants in the meeting on June 4th, either Mrq Jensen or myself, might have off the cuff said, 'Well, it seems like an unusual and extremely difficult if not impossible task,' but that would have been an off the cuff, without benefit of data.

"Q As far as the date is concerned, the date you said was June 4th?

"A I meant January 4th, the one meeting of January 4th.

"Q The example you gave was a negative example concerning the feasibility of the project. Did Arthur D. Little ever give Prudential or EDA a positive evaluation of the project?"

MR. FARRELL: Objection.

THE COURT: I will overrule that objection.

MR. RIGNEY: "Q Let me repeat the question without the preface.

"Did Arthur D. Little ever give a positive, affirmative opinion concerning Prudential's proposed Puerto Rican refinery?

"A No."

MR. FARRELL: I renew my objection.

THE COURT: Same ruling.

MR. RIGNEY: "Q Mr. Shippee testified at page 175 of the transcript of his deposition in response to the following question:

"'Question: Did you have anything down on paper from A.D. Little by the time you met with them?'

"Mr. Shippee's answer in part was: 'No. It was the presentation of the concept, and then they developed into it and they made a report of the logic of it.'

"Then there is some material that follows that is not pertinent.

"Did Arthur D. Little ever make a report of the logic of the Prudential proposal project for Puerto Rico?

"MR. MARKS: I will object to that unless you read the witness the rest of Mr. Shippee's answer to that question.

"Let me read the whole answer.

"The answer to the question, 'Did you have anything down on paper for A.D. Little by the time you met with them,' was, 'No, it was the presentation of the concept, and then they developed into it, and they made a report of the logic of it. It was not a consideration of a flow scheme, an engineering structure or production plan.'

"My question is did Arthur D. Little ever make a report of the logic of the proposed project for Puerto Rico that was proposed by Prudential?

"A No, neither written nor oral."

Your Honor, with one possible exception, that would conclude-- yes, I have one final section, your Honor, from this deposition. It is at page 67, line 6:

"Q Will you describe the projects that did use the concept of the core?

"A Two that immediately come to mind is a refinery that Hydrocarbon Research designed and built in Portugal for Sacor, which is a long name, a Portugese name, and I will not try to spell it. That refinery was based on the concept that a major part of the stream from the refinery would be for the purposeof petrochemical and chemical operations. A project that Hydrocarbon Research designed for the Government of Brazil known as Cubatao had a similar concept.

"Q At the January 4, 1963 meeting, did Mr. Shippee make reference to a utility concept?

"A I think the word 'quasi-utility' concept was referred to, and the implication that we got from the meeting was or I got from the meeting was that it wuld have a subsidy of some kind from the Commonwealth of Puerto Rico to assure it of a return on investment that would be equivalent to that that a utility in any part of the world would normally expect."

Your Honor, that concludes my reading from this

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from this deposition.

THE COURT: Mr. Farrell may now read from Mr. Norton's deposition.

MR. FARRELL: Your Honor, I would like the clerk to mark this one exhibit as Plaintiff's 239 because I will refer to it in the reading.

(Plaintiff's Exhibit 239 was marked for identification.)

MR. FARRELL: Page 27, line 7:

"Q Do you have any recollection of the telephone conversation that is described in Plaintiff's Exhibit 239 for identification?

"A Yes.

"Q Can you state your recollection?

"A Well, Mr. Robert Cornwell, who had been a vice president of Hydrocarbon Research, and to whom I reported before he became vice president and general manager of National Distillers and Chemical Corporation, had told me that he was working on a petrochemical plant for Puerto Rico, and so I called him to ask him what progress he had made, and he reported to me on a confidential basis thatthey had proceeded in negotiating with Commonwealth Refining for a feed stream that could be used for the production of a basically oriented petrochemical polyethylene, for a plant in Puerto Rico. He told me that everything had been negotiated to the point where they were within a twenty-four hour signature between Commonwealth Oil Refining and National Distillers, when the European Common Market tariff was raised on polyethylene, and it appeared that the market they had hoped to serve was now not available to National Distillers.

"Q What conclusion did you draw from the information that Mr. Cornwell gave you?

"A The conclusion I drew was thatif there were a need for petrochemical stocks that Commonwealth Refining were not only interested but capable of providing some of the requirements, a major portion.

"Q Did this information cause you to question anything that was said at the January 4, 1963 meeting?

"A Only the statement that it was necessary to bring a third refinery into being to provide petrochemical stocks."

Now I'm reading page 38, line 8:

"Q In describing your conversation with Jim Jensen and Jim Bradley, you stated that it was concluded that this 70 percent requirement was too difficult to be done. What were the grounds or the bases for that conclusion?

"A Since I am not a designer of refineries I will have to refer to what Mr. Bradley stated.

"He felt that the 70 percent utilization of feedstock would be difficult if not impossible to reach.

"Mr. Jensen and I both felt that it would be unlikely that markets could be found even if an objective approaching 70 percent were realizable.

"Q Do you have any recollection of your conversation with Jim Jensen and Jim Bradley after the telephone conversations with Nathan Shippee, other than the recollection you have already testified to?

"A No."

And, your Honor, I now am reading from page 42, line 21:

"Q I show you a document dated January 3, 1963 and ask you if you can identify this document.

"A Yes, this is a summary of the information that was obtained on the Prudential Oil Corporation's financial and organizational status by Miss Martha Cotton, who was in Mr. Klausen's office and would be the one that I would normally have requested the Dun & Bradstreet from. She was the one who made the arrangements to get the Dun & Bradstreet reports or other financial information."

That's all I have, your Honor.

THE COURT: Anything else from Mr. Norton?

MR. RIGNEY: No, your Honor.

MR. FARRELL: I'm sorry, your Honor, there was one other page. Page 58, line 18:

"Q Turning your attention to your memorandum, which was dated March 5th but dictated March 1st, and turning your attention expressly to the next to the last paragraph, do you recall whether Mr. Irizarry told you what statements had been included which were embarrassing?"

That refers to Defendant's 128, which was read.

"A No.

"Q Did he tell you what statements they had been told to keep out of written reports?

"A No.

"Q So you did not understand the substance of these statements?

"A That is correct.

"Q And you didn't ask Mr. Irizarry?

"A No.

"Q Did you ask Mr. Irizarry what they were?

"A No.

"Q Did Mr. Irizarry describe to you the statements?

"A No.

"Q You testified, I believe, that you never received anything in writing from Prudential, is that correct, concerning the project?

"A That is correct.

"Q So you had not seen the prospectus which Mr. Irizarry described as non-professional?

"A No.

"Q As of the meeting of January 4, 1963, who did you understand was in the Prudential group?

"A The people who were introduced at the meeting, plus a comment made that Kuhn Loeb was also interested in this.

"Q And thereafter did you understand that Mr. Chapman was involved?

"A Not directly.

"Q And did you understand that he was involved indirectly?

"A Yes.

"Q In what way?

"A That he and EDA had been in discussion and that they had carried the discussions to Prudential.

"Q And did you understand Mr. Anderson was involved?

"A Yes.

"Q And what did you understand about his involvement?

"A That he was a friend and maybe an investor with

Mr. Shippee. You are talking of Mr. Robert Anderson?

"Q Yes. I am sorry. He is the only Anderson that figured in this case so far."

That's all I have.

MR. RIGNEY: Your Honor, in view of Mr. Farrell's further reading from the deposition and reference to the memorandum that you have admitted, I would respectfully request that your limiting instruction be removed, since Mr. Farrell has now gone further in reference to that document.

THE COURT: Well, I decline to modify my instruction. However, the jury may consider the testimony read as evidence of the truth of what's been testified to on the deposition just the same as if Mr. Norton had come in here and sat on the witness stand and given you his testimony.

All right, let's go forward.

MR. RIGNEY: Your Honor, I would now like to read a total of six questions and answers from the deposition on written interrogatories of Oscar L. Chapman. I believe your Honor has the original of that document.

Your Honor, question 31 on page 30:

"Q31 Did you receive the two packages containing the original and two copies of a 'presentation' referred to in Exhibit P-112 for identification? If so, please state whether or not at that time you had requested or expected to receive copies of any such presentation and whether you at any time submitted the presentation to any governmental agency, identifying the date of submission and the agency.

"A I do not remember" --

THE COURT: I'm sorry, are you on page 31?

MR. RIGNEY: I was on page 30, at the beginning of question 31, and that then continues on page 31. I may have misspoken, your Honor.

THE COURT: The way I read it, he says "I do remember."

MR. RIGNEY: You're right. I did misspeak.

"A I do remember receiving copies of a presentation referred to in Plaintiff's Exhibit 112. Mr. Shippee had written to Mr. Anderson and sent a copy of the letter to me referring to preparation of a presentation and later wrote to me referring to the drafting of a presentation. I was interested in seeing the presentation and so expressed myself. I did not submit the presentation to any governmental agency.

"Q32" --

MR. FARRELL: Your Honor, I will object to to question 32 and the answer.

THE COURT: May I see the document therein referred to?

MR. RIGNEY: I have a copy here, it's Plaintiffs Exhibit 113.

THE COURT: Is it in evidence?

MR. RIGNEY: I don't believe it is.

MR. FARRELL: It is not in evidence, your Honor.

MR. RIGNEY: Your Honor, I might note this question only asks whether he received --

THE COURT: I know that. There is no question wasting time whether he received it if it won't be admissible.

I would take it in the absence of a showing why I shouldn't take it.

MR. FARRELL: Your Honor, it is completely irrelevant. We offered this, I think you're right, we offered another document which related to this earlier in the trial, and you sustained the objection to it on the ground of relevance.

THE COURT: Come up to the side bar, please.

(At the side bar.)

MR. FARRELL: I would have to get the number of the documents.

MR. MARKS: Here.

MR. FARRELL: We offered --

THE COURT: Has Blinken been deposed?

MR. FARRELL: Yes. We offered 111 and this was Shippee's version of a dispute with Warburg. You sustained the objection on the ground of relevancy.

THE COURT: What is the basis for offering this through Chapman?

MR. RIGNEY: It is a document that he received in the regular course of his practice at the time. I wanted to lay a foundation for the fact -- it is really, your Honor, the predicate that this lays for the ensuing question, question 33. It is without at least an identification of this letter -- this explains the state of mind of Oscar Chapman concerning a proposal which plaintiff has, I believe you have offered --

THE COURT: You see the fact of showing it is relevant, whether he showed it to a governmental agency, but his reasons for doing so are not binding on this plaintiff as I understand it. The fact that he showed it-- we are talking about 112 at this point, aren't we?

MR. RIGNEY: No, we are referring to, I believe, the present dispute concerns 113, your Honor. That is the document that Mr. Farrell has handed to you.

THE COURT: Question number 33 is talking about what number?

MR. FARRELL: You mean Defendant's Exhibit 78?

MR. RIGNEY: That is Plaintiff's 112.

THE COURT: It is 112?

MR. RIGNEY: That's right. Your Honor, that is a letter enclosing copies of a brochure that you have identified as a Prudential June, 1963 brochure.

MR. FARRELL: That letter is in evidence.

MR. RIGNEY: That letter is in evidence.

THE COURT: Isn't there some testimony that he did show the brochure to Moore?

MR. RIGNEY: No, in fact, it was an earlier brochure and Bruce Brown stated that brochure was not shown.

THE COURT: I will permit you to read that part of question 33 -- well, he's already said he did not show it to a governmental agency, so I will sustain the objection to this line of inquiry, as to Plaintiff's 113 and question 32 of the Chapman interrogatories.

MR. RIGNEY: That would then apply as well -- I would offer, just to make the record clear, question 33 and its answer and your ruling is the same?

THE COURT: Same ruling. However, you can read from these interrogatories, I think you already have read it, that he did not submit 112 to any government official.

If that be the truth --

MR. FARRELL: It's been read. He said "I didn't do anything with the proposal."

THE COURT: I will permit that to stand.

MR. RIGNEY: Your Honor, I respectfully except.

THE COURT: You have an exception to all evidentiary rulings, both of you.

(In open court.)

MR. RIGNEY: Your Honor, I would next turn to page 36, question 42:

"Q42 Did you at any time reach any agreement with E. M. Warburg & Co., Inc., Kuhn Loeb & Co., Inc., Prudential Connecticut, Nathan M. Shippee or Robert B. Anderson regarding any obligation to you or as to the compensation you were to receive for your work in connection with a proposed project for a petrochemical refinery in Puerto Rico? If so, please state when and with whom such agreement was reached and the substance thereof and produce and identify any documents relating thereto and permit copies thereof to be annexed to your answers to these interrogatories.

"A No.

"Q43 Were you ever, in any manner retained as counsel or in any other capacity, by E. M. Warburg & Co., Inc., Kuhn Loeb & Co., Inc., Prudential Connecticut, Nathan M. Shippee or Robert B. Anderson? If so, please state by whom, for what purpose and for what period.

"A No.

"Q44 Were you ever paid any amount in cash or given anything of value by E. M. Warburg & Co., Kuhn Loeb & Co., Inc., Prudential Connecticut, Nathan M. Shippee or Robert B. Anderson? If so, please state when, by whom , for what reason and specifically what you received.

"A No."

MR. FARRELL: Your Honor, we would like to read the next two questions right now.

We think that this would be the appropriate time to do it.

THE COURT: I will permit you to do that.

MR. FARRELL: Question 45:

"Q45 In the summer of 1963 did you speak on the telephone with Stanley Learned of Phillips regarding a possible Puerto Rico refinery project? If so, please state the approximate date of such call and the substance of your conversation with Mr. Learned.

"A Yes, it is my recollection that I did speak with Stnaley Learned of Phillips Petroleum Company concerning a possible petrochemical project in Puerto Rico during the summer of 1963. I do not recall the precise date of this conversation although I believe it was probably in late July or early August 1963. My recollection is that Mr. Learned called and expressed interest in such a project and a desire to meet personally to discuss the matter.

"Q46 As a result of any conversation referred to in your answer to Interrogatory 45, did you take any action? If so, please state what action you took and when and with whom you took it.

"A As a result of the conversation referred to in answer to Interrogatory 45, it is my recollection that on the following day or if not the following day then quite soon after the conversation, my partner, Mr. Friedman, and I were visited by Mr. Stanley Learned and Mr. William Keeler of Phillips Petroleum Company.

"Mr. Learned expressed interest in the possibility of Phillips undertaking establishment of a petrochemical project in Puerto Rico. Subsequently, Phillips Petroleum retained my firm during November 1963 to assist in obtaining the necessary approvals of the federal government.

"Thereafter, for over two years members of my firm and I devoted a considerable amount of time and energy toward seeking for Phillips the grant of an allocation from the U.S. Department of the Interior to import unfinished oils into

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Puerto Rico. This effort consisted of numerous conferences with officers and employees of Phillips during the fall of 1963 as well as conferences with Jack Coan and Rafael Durand, Administrator of the Puerto Rican Economic Development Administration, leading up to submission on December 16, 1963 by Phillips of a proposal to the Commonwealth Government for the establishment of a core chemical facility in Puerto Rico.

"Thereafter individuals within my firm prepared a review of the legal basis of the Mandatory Oil Import Program including Presidential Proclamation 3279 of March 10, 1959 and the Oil Import Regulations issued by the Secretary of the Interior in implementation of the Proclamation. We prepared as well an analysis of all prior amendments to Proclamation 3279 and an analysis of the authority of and decisions which had been rendered by the Oil Import Appeals Board, an administrative review board within the Department of the Interior which is established to consider petitions by persons who are not otherwise eligible under the Oil Import Regulations to receive allocations to import crude petroleum or petroleum products subject to quota restriction.

"These analyses led to the preparation and filing by my firm on behalf of Phillips of a petition to the Oil Import Appeals Board seeking grant by the Board of an allocation to import unfinished oils into Puerto Rico.

"Contemporaneously, members of my firm and I were in consultation with Mr. Coan and Mr. Durand in order to gain support for the Phillips project by Economic Development Administration (EDA) officials and to seek to have EDA request that the Secretary of the Interior increase the level of imports of petroleum into Puerto Rico in order that any grant by the Appeals Board could be made effective.

"As a result of these discussions the EDA administrator, Mr. Durand and later the Governor of Puerto Rico, Mr. Munoz, notified the Secretary of the Interior of their support of the Phillips project.

"On May 1, 1964 I formally requested on behalf of Phillips that the Secretary increase the maximum level of imports into Puerto Rico and submitted to him Phillips' proposal for the Puerto Rican petrochemical project. Thereafter during the early summer of 1964 the Secretary of the Interior determined that a public hearing should be held on the subject of oil imports into Puerto Rico and the extent to which economic growth in the Commonwealth could be stimulated by establishment of a petrochemical complex on the island. Individuals within my firm assisted in the drafting of testimony presented by Phillips witnesses at the public hearing held July 31, 1964, and additional comments

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by Phillips filed on August 26, 1964 before the hearing record was closed.

"After Departmental review of the hearing record the Secretary of the Interior on February 11, 1965, announced that the Department would enter into final negotiations with Phillips to ascertain whether a plan could be developed to insure the building of a major petrochemical complex in Puerto Rico involving maximum economic benefits and maximum employment opportunities for Puerto Rico.

"Thereafter, on February 26, 1965, representatives of Phillips and members of my firm and I entered into negotiations with Assistant Secretary Kelly of the Department of the Interior. These negotiations resulted in agreement by Phillips to make a number of investment commitments and led to a letter from the Secretary of the Interior released on May 14, 1965, in which the Secretary agreed to recom to the President necessary changes in the Mandatory Oil Import Program conditioned upon receipt from the Commonwealth Government and Phillips of an agreement providing for the execution of a definitive, legally enforceable contract to implement establishment of the petrochemical project.

"Thereafter, individuals within my firm along with representatives of Phillips entered into negotiations with officials of the Puerto Rican Economic Development

Administration resulting in an agreement dated May 27, 1965 between the Government of the Commonwealth of Puerto Rico and Phillips Petroleum Company which set forth Phillips' obligations.

"An exchange of letters between Phillips and the Commonwealth was also prepared by individuals within my firm relating to construction and operation of port facilities designation of area to be condemned for plant facility, long-term lease of land for plant facility, arrangements for purchase from Commonwealth Government of power facilities and arrangements with the Commonwealth Government relating to ownership of nylon fiber plant to be constructed by Phillips and Rhone-Poulenc, S.A.

"The agreement of May 27, 1965 was submitted to the Department of the Interior and following discussions between individuals within my firm and the Interior Department Solicitor, the agreement was approved. Thereafter individuals within my firm assisted in drafting of definitive agreements called for by the Secretary of the Interior and necessary to implementation of the agreement of May 27, 1965.

"After amendment by the President of Proclamation 3279 on December 10, 1965, individuals within my firm and Phillips representatives conferred with representatives of the Department of the Interior in connection with conditions to be placed on allocation to be issued to Phillips to import unfinished oils into Puerto Rico. An allocation to Phillips was issued on December 23, 1965.

"There are annexed hereto copies of items mentioned above" -- which I will not read. It is a list of documents.

THE COURT: All right.

Is there anymore from Mr. Chapman that you want to read, Mr. Rigney?

MR. RIGNEY: Your Honor, I have two questions and answers remaining.

First, to follow the last reading by Mr. Farrell, cross question 34 that appears on page 73:

"XQ(34.)33 The reporter will show you a copy of a document annexed to these cross-questions and marked as cross-question exhibit D-136 for identification, which is a copy of a memorandum setting forth a 'Summary Oscar Chapman Meeting, August 7, 1963'. Please state:

"(a) the author of this memorandum;

"(b) where and when the meeting referred to therein took place;

"(c) who initiated the arrangement for the meeting and the persons present thereat;

"(d) the relationship between" --

MR. MARKS: Did you say D-136?

MR. RIGNEY: Yes, it is a --

MR. MARKS: I don't think that is correct.

MR. RIGNEY: It is D-136.

MR. MARKS: All right.

THE COURT: Have you agreed on the number?

MR. RIGNEY: I believe we have, your Honor. It is D-136.

THE COURT: All right.

BY MR. RIGNEY:

"(d) the relationship between the 'Puerto Rican Refinery-Petrochemical Complex' referred to in said Exhibit and the 'Project for Petrochemical Plan in Puerto Rico' referred to in Defendant's Exhibit 78 for identification.

"If you or your law firm hold any writings relating in any way to this meeting, please produce and identify such writings and permit copies thereof to be annexed to the answers to these cross-questions."

MR. MacCRATE: Just a moment. Defendant's Exhibit 78 for identification is P-112 in evidence at this trial.

MR. RIGNEY: I correct the statement.

THE COURT: All right.

MR. RIGNEY CONTINUING:

"A I do not know who is the author of this memorandum."

That is D-136.

"The meeting referred to in the memorandum was a luncheon meeting which took place in Washington , D.C. on August 7, 1963. My recollection is that the meeting was arranged during a telephone conversation I had with Stanley Learned of PHillips Petroleum Company a day or so prior to the meeting. Mr. Carstens Slack and Mr. Miller W. Conn of Phillips attended along with myself and my associate, Mr. Michael J. Shea.

"There was no relationship between the 'Puerto Rican Refinery-Petrochemical Complex' referred to in the Exhibit D-136 and the 'project for Petrochemical Plant in Puerto Rico' referred to in Plaintiff's Exhibit 112 in evidence, except that both refer to a petrochemical project in Puerto Rico.

"There is attached hereto a file memorandum dated August 8, 1963 relating to this meeting."

Now, your Honor, my final question from this deposition is cross-question 26 at page 68:

"XQ(26)25 With respect to Plaintiff's Exhibit 116 for identification, please identify the 'record' you maintained in your office at or about June 6, 1963. Please produce and identify any writings relating in any manner to said 'record', including documents, correspondence, memoranda, telegrams, legal briefs, and other items constituting the 'record' or related thereto and permit copies of said writings to be annexed to your answers to these cross-questions.

"What did you do with the 'record' subsequent to June 6, 1963? If any part of said 'record' was used in connection with an application for an oil import quota by Phillips Petroleum or anyone else, please identify the part of said 'record' so used, the name of the person or persons on whose behalf said 'record' was used and the present whereabouts of said 'record' or any part thereof.

"A The 'record' referred to was the presentation sent to me by Mr. Shippee. I took no action with respect to the presentation after June 6, 1963. So far as I am aware no part of the presentation was used by Phillips Petroleum Company in connection with an application for oil import quota."

Your Honor, that would conclude my reading from the Chapman deposition.

THE COURT: At this time, members of the jury you may withdraw to the jury room for a brief recess.

(Jury left the courtroom.)

(Jury present.)

MR. RIGNEY: I will now read from the deposition of Rafael Durand which was taken at pretrial proceedings on September 28, 1973.

I begin at page 3, line 5:

"Q Will you briefly trace for us your career up to the time that you became administrator of EDA?

"A My first job after graduation from the University of Puerto Rico, that was in April '44, was with the Department of Education, it was a brief three-month assignment, because I was recruited by the Army where I had a brilliant career: I started as a sergeant and quit as a corporal two years later. I rejoined Government immediately after I was dismissed by the Army and that was April '46. I was appointed then as deputy director of the Bureau of Labor Statistics. That was really my first full-time job, until 1947 when I enrolled at the Boston Graduate University and got an MA nine months later, Master of Arts, specialized with a concentration in economics and statistics.

"On my return to Puerto Rico, I rejoined the Department of Labor, Bureau of Labor Statistics and in 1949 I was appointed to head the six-year financial program of the Planning Board of Puerto Rico and the Master Planning

Division of that agency.

"In 1955 I was appointed comptroller at the Economic Development Administration. That was 1955.

"A year later I was appointed executive director of all Fomento operations in the mainland, in the United States.

"In 1959 I was appointed executive director of the Puerto Rico Ports Authority and Deputy Administrator of Formento.

"Late in 1960 I took over as Administrator since Mr. Moscoso was on his way out. He was transferred to New York and a little later on, appointed Ambassador to Venezuela. My tenure as Fomento Administrator lasted until March 1, 1968.

"Q Can you briefly describe for us the objectives of the work of Fomento, of the EDA?

"A Fomento is the agency entrusted with the economic development of the Island. The three basic programs of that agency at that time, because it was la reorganized, were industrial promotion and development, tourism development, and ports and airports planning and development. Those were the three main areas of operations.

"Q And as of what time was that?

"A Well, until two years ago, the agency was reorganized and ports authority was transferred to another agency and tourisms department became an independent public instrumentality.

"Q So that the organization of the agency for the entire period you were with it, was as you have just described?

"A That's right.

"Q Was there a program or project known as 'operation bootstrap'?

"A That was the glamorous name for the effort of economic development of Puerto Rico. The Island was a poor community 15 years ago. The economy was based on sugarcane. There was an overdependence on an agricultural economy and there was enormous poverty in Puerto Rico, so a new economic strategy was designed and that was called 'operation bootstrap' and that was the real inception in the 1940's, of economic development program of Puerto Rico."

I would next read beginning with page 11, line 12.

"Q Do you have today, and I realize that it's 12 years ago, any recollection of meetings with Mr. Kelley or others in the Oil Import Administration in the fall of

1961 or around this time?

"A I do not recall. The meeting I do recall was in '61, December, with Secretary Udall. Prior to that I do not recall whether I had meetings. I could have, but -- in other words, I am not saying that I did not have meetings ith the Department of the Interior officials. The only meeting I recall in '61 was with Secretary Udall.

December of '61.

Q Where did the meeting with Secretary Udall take place?

"A At the International Airport, Governor's room.

"Q Do you recall who was present at the meeting?

"A Yes. It was Secretary Udall, Van Hyning and myself only. The three of us.

"Q And what did you discuss with Secretary Udall at that time?

"A I made a presentation to him about Puerto Rico's economy, the need to introduce new elements of growth into our situation, the convenience of the mutuality of interests between the United States and Puerto Rico in this connection.

"I told him that we felt that it was to the mutual advantage of the United States and Puerto Rico to have this economy grow vigorously because we are the fourth or fifth market of the United States and that it was in the best interests of the United States and the selfish interest of Puerto Rico to introduce the necessary structural changes to our economic situation that would guarantee a sustained rate of growth for our economy. That was the basic, the gist of the conversation.

"Q And what were the responsibilities of Secretary Udall that related to this that you were saying to him?

"A He had to implement the oil import program. It was under the Interior Department.

"Q And how did the oil import program affect Puerto Rico at that time?

"A Well, we had a restriction of only the two existing refineries who were the recipients of any increases in the import quota allocation.

"Q And you were seeking to enlist Secretary Udall's support for establishing of a petrochemical industry here in Puerto Rico?

"A I was seeking an amendment to the oil import quota proclamation, presidential proclamation, in order to allow for this third refinery concept.

"Q I show you a copy of a letter which has been marked as Plaintiff's Exhibit 37 dated December 12, 1961

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and is addressed to the Honorable Stewart L. Udall and ask you if you can identify that letter?

"A Yes, this signature, this was a letter sent to Secretary Udall.

"Q That was sent to Secretary Udall on December of 1961?

"A Correct."

At this time I offer in evidence Plaintiff's Exhibit 37 which I would like to read at this time.

THE COURT: Received in evidence.

(Plaintiff's Exhibit 37 for identification was received in evidence.)

x (Exhibit read.)

(Continued on next page.)

MR. RIGNEY: Your Honor, I would next read beginning at page 17, line 22:

"Q Mr. Durand, I show you Defendant's Exhibit D-43, which is dated March 7, 1962, and is a copy of a letter directed to Mr. W.H. Edwards of Texaco and ask you if you can identify that letter?

"A Yes. This was my . . . this is my signature and tht letter I recall.

"Q Calling your attention to the fourth paragraph in the letter, this is a clearer copy, which commences, 'It is my opinion that feasibility of the Texco project will hinge on petrochemical production,' does that paragraph reflect EDA's policy as of March 1962?

"A Definitely."

Your Honor, at this point I offer D-43 in evidence.

MR. FARRELL: No objection, your Honor.

THE COURT: It will be received in evidence.

(Exhibit D-43 received in evidence.)

x MR. RIGNEY: Your Honor, this is a one-page letter which I would like to read.

(Mr. Rigney read from Exhibit D-43 in evidence to the jury.)

MR. RIGNEY: Your Honor, I would next read at

"Durand page 20, line 15:

"Q There has previously been marked, Mr. Durand, a document from the files of A. D. Little Company, a Mr. Josiah Norton, as Plaintiff's Exhibit 192, a memorandum dated January 18, 1963" --

THE COURT: Is that the right number?

MR. RIGNEY: Your Honor, I am unclear whether this document has yet been introduced in evidence. I would correct the record as soon as I am able to.

". . . noting, 'Dictated January 17, 1963' and the memorandum reports a conversation that Mr. Norton of A. D. Little had with Mr. Shippee and states, 'Mr. Shippee elaborated by saying that he and Robert Anderson had a meeting with Durand yesterday,' which presumably would be January 16, 1963, 'at which time an agreement was reached that the request to Secretary Udall would be for a 60,000-barrel core feedstock refinery. This was higher than Mr. Anderson felt would be realized, but he agreed that to shoot high was desirable.'

"Do you recall any such discussion at that meeting . . .

"A No.

"Q . . . with Mr. Anderson . . .

"A I don't think we were prepared at that time to talk about 60,000 barrels without a concept. I recall it was a very brief meeting, I recall that Anderson had his coat hanging on his arm, because he is going to leave for the airport in a hurry, the meeting was very brief and I don't think we went into such a detailed discussion of a project.

"Q Did you at any time indicate to Mr. Shippee that you would support any proposal that he would make?

"A That was the only meeting I had with Mr. Shippee to the best of my recollection and I don't recall having told him that he would have our support."

Your Honor, I would next read at page 26, beginning at line 22:

"Q Did you at any time, prior to January 1964, address a letter of support with respect to a particular petrochemical project to Secretary Udall?

"A I don't think so.

"Q The letter of December 12, 1961, Joint Exhibit 19, with respect to the Gibbs group project was directed to the Gibbs group and Mr. Coan, was it not?

"A That's right.

"Q And the letter to Mr. Chapman of May 18, 1962, Joint Exhibit 35, was directed to him as the general counsel of the Puerto Rico Chemical Company?

"A That's correct.

"Q I show you a copy of Defendant's Exhibit D-179" --

I would like at this point to interrupt the chronological by page reading in order to refer to a matter that in the chronological history of the case comes in here, if I may. That would be at page 73, line 9:

"Q Mr. Durand, I show you a document which has previously been marked Joint Exhibit 44 for identification and a document which has been marked Joint Exhibit 45 for identification. The first bearing a date of January 2, 1964 and the second bearing a date simply January 1964 and I ask you whether you recall receiving that letter and rhe enclosure?

"A The letter I . . . I did receive the report. Looks like the one that was discussed at the January meeting in San Juan. That's all I can say, because I cannot swear that this is the exact report.

"Q You cannot, by looking at it . . .

"A This looks like the report we discussed uh . . . in January '64 with the . . . at the meetings in my office with the Phillips Company.

"Q All right. Now, did you understand that the purpose of the report was that stated in the first paragraph?

"Did you understand that that was the purpose of this report, what is stated on that first paragraph?

"A That's innocuous. . . it's an innocuous statement. uh . . . I see why they . . . they understood it, but this is an innocuous statement, to say that this uh . . . if I had to explain the purpose, I would explain it in much more strong and specific terms.

"Q Well, how would you explain it?

"A Uh . . . uh . . . the . . . Explaining a project for a petrochemical core industry as an essential requirement for the continued economic development of the Island of Puerto Rico. That's a very innocuous statement, the one made there. Otherwise that will not help you."

Your Honor, I then return to page 27, line 9:

2 "Q I show you a copy of Defendant's Exhibit D-179, which is a copy of a letter dated February 14, 1964 addressed to Secretary Udall from Governor Munoz Marin, and ask you if you are acquainted with that letter?

"A Yes.

"Q Did you play any part in the preparation or the suggestion that such a letter be sent?

"A I had to persuade Governor Munoz Marin to sign this letter. It was an open battle to get him to sign such a letter.

"Q And what was your reason for seeking that he write such a letter?"

THE COURT: Is this essential to this case?

MR. RIGNEY: Yes, your Honor.

THE COURT: A big argument between the Governor and Mr. Durand, and then the Governor gives in and signs it. Is that important?

MR. RIGNEY: Well, it is the fact of the letter being written, your Honor.

THE COURT: Nobody disputes that it was written, do they? And whether he had a dispute with the Governor to get him to sign it, I don't think is very important.

MR. RIGNEY: "Q And what was your reason for seeking that he write such a letter?

"A Well, such a major policy decision on the part of the Government of Puerto Rico and the U. S. Government required the endorsement of the Governor of Puerto Rico."

Your Honor, I would offer in evidence Defendant's Exhibit 179.

MR. FARRELL: No objection, your Honor.

THE COURT: It will be received in evidence.

(Exhibit D-179 received in evidence.)

MR. RIGNEY: It is a three-paragraph letter and I would propose to read it at this time.

(Mr. Rigney read from Exhibit D-179 in evidence to the jury.)

MR. RIGNEY: Now I am going to read at page 27, your Honor:

"Q Now, did there come a time in 1964 when you gave testimony in Washington?

"A Yes."

THE COURT: Isn't that testimony already in evidence?

MR. RIGNEY: Your Honor, the volume of testimony has been received.

THE COURT: Let's not waste time with things that are already in the trial record. We all know and there is no dispute that Mr. Rafael Durand, Administrator, made a statement and gave it at the hearings.

MR. RIGNEY: Your Honor, I would then propose -- and I think it is the principal final document that I have to in any way read from to the jury -- I would propose to read excerpts from that document.

THE COURT: All right.

MR. RIGNEY: This is Joint Exhibit J-53. It is the official report of proceedings before the United

States Department of the Interior, Office of Oil & Gas in the matter of oil imports from Puerto Rico.

(Mr. Rigney started to read from Joint Exhibit J-53 in evidence to the jury.)

MR. MARKS: I'm just wondering whether this is necessary. It is in evidence and there is no dispue about it, and it is very long.

THE COURT: I don't think he plans to read it all, but I would like you not to read anything you don't have to read.

MR. RIGNEY: I have no intention of reading the entire document.

THE COURT: He came down and endorsed the application, didn't he?

MR. RIGNEY: He did so in a way which verifies the history.

THE COURT: All right, you may read the part which you think is important, but please move along.

MR. RIGNEY: Yes, I am trying to.

(Mr. Rigney continued reading from Joint Exhibit 35 in evidence to the jury.)

MR. RIGNEY: That would conclude my reading from Mr. Durand's testimony in Washington in 1964.

I go to page 23, your Honor, line 13:

"Q In connection with the preparation of that statement, did you consult with anyone?

"A There were many people involved in the preparation of such a statement. Van Hyning, John Rigby from Arnold & Porter --

"Q Attorneys for EDA?

"A Yes. I remember that Chapman was involved and Martin Friedman was also involved in details of the testimony.

"Q Do you recall at or about this time in July of 1964 having a meeting with Robert Anderson in New York?

"A There was a meeting with Robert Anderson in New York in -- around that time, yes.

"Q Can you tell us what you can recall of what you discussed with Mr. Anderson at that time?

"A Yes. We talked about military properties, Navy properties, in Puerto Rico and also of profit allocation problems that was faced by subsidiaries of U.S. industries operating in Puerto Rico within the U.S. Tax Revenue Act.

"Q Did you discuss your testimony that you were going to give to the Oil Import Administrator with Mr. Anderson?

"A I don't recall discussing the testimony with him."

I will conclude my reading from Mr. Durand's deposition by reading from page 40, line 17.

THE COURT: Do I have to take all this? Isn't this all in the record? Can we get a concession on the record?

MR. RIGNEY: This is only a preface to the gist of this which is not in the record and should be placed there.

THE COURT: I will take your offer of proof at the side bar.

(At the side bar.)

THE COURT: There does come a time when things just get simply too cumulative.

What do the next ensuing pages add?

MR. RIGNEY: This is one of the more pungent parts of the pretrial testimony. Mr. Durand described his final efforts that he made with the Administration to secure this import quota.

It is not offered to further describe any letter that he wrote but only his version of anger and frustration that the Administration did not take decisive action and it is only a page.

THE COURT: Nobody holds that Administration in lower regard than I but I don't see what this adds to the case. If you want to read it go ahead, you may. I wish you would all cut it down.

MR. RIGNEY: This would be my final statement.

THE COURT: Go ahead and read it.

(In open court.)

MR. RIGNEY: Page 40, line 17:

"Q Mr. Durand, I would like to ask you one additional question. At the time that you were in correspondence with Lee White at the White House in late 1965, did you have conversations with him at that time?

"A I had one meeting plus several telephone conversations.

"Q Would you describe your meeting with Mr. White?

"A It was a hectic meeting, because he claimed that the President was upset, unhappy about Secretary Udall's decision and that he was being influenced by people who claimed that there was a privileged treatment for one company, Phillips. I described to him at the meeting and on subsequent letters the record of this case, and told him that I doubted that the President, even the

President could decide not to amend the proclamation on account of moral and political circumstances.

"Q Do you recall what you said to Mr. White at that time?

"A I recall most of the conversation, yes.

"Q And what do you recall about it?

"A It's a -- I would prefer not to include that in the record.

"Q Is this for reasons of governmental policy or--

"A It might be construed as a lack of respect to the President, the way I expressed myself.

"Q You expressed yourself rather forcefully in support of getting the quota amendment?

"A The next move would have been to punch him in the nose and that was not possible.

"Q Well, what did you state as the basis for your position?

"A I told him it was in the basic interest of both United States and Puerto Rico that that was very easy to understand and to prove and that we had worked for over five years with many companies and none of them could present a concept that was agreeable to both Interior and the Government of Puerto Rico.

Q Did you discuss the conditions that had been laid down by EDA?

"A Yes.

"Q What did you say about that?

"A That they were very -- that they were conditions that guaranteed substantial development of the -- a development of a new synthetic raw material base for Puerto Rico.

"Q What did you say as to the effect upon Phillips of such conditions?

"A Well, since they were committed to reinvest all profits during the ten-year term of the contract in satellite operations in Puerto Rico, that would have -- that would assure a substantial petrochemical development in the Island and that no other company came up with a proposal accepting such conditions."

That concludes my reading from this deposition and I think from all depositions.

THE COURT: Do you have anything further from Durand?

MR. FARRELL: No, your Honor, but at this time I would like to read one paragraph from Joint Exhibit 70, the agreement of May 27, 1965 between Phillips and EDA and the Commonwealth which bears directly on the last answer that Mr. Durand gave.

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THE COURT: All right.

(Page 16, Paragraph F read.)

THE COURT: Anything else you want to read? Do you want to read the entire sentence?

MR. FARRELL: No.

THE COURT: You may finish it.

(Exhibit read from.)

MR. RIGNEY: Since it wasn't our thought to read a force majeure clause I don't think that is --

THE COURT: I don't regard that as a force majeure clause. Some of the things listed were not within the concept of a force majeure.

MR. RIGNEY: Your Honor, I would like to complete or offer to prove an offer into evidence Defendant's Exhibit 24.

THE COURT: Any objection to that?

MR. FARRELL: I have no objection to it.

THE COURT: D-24 received in evidence.

(Defendant's Exhibit 24 for identification was received in evidence.)

MR. RIGNEY: To conclude our submission I would like to state that defendant would offer in evidence Interrogatories 26-B and C, 34-A and 47 which was sworn to by the plaintiff on July 6, 1971 and I propose to submit marked copies of those but I wantto note that for the record.

MR. FARRELL: No objection.

THE COURT: They will be received and I will direct the Clerk to designate a number for the redacted copy.

MR. RIGNEY: May I have a moment?

THE COURT: Certainly.

(Pause.)

MR. MacCRATE: Might we leave open for submission a few additional documents in this case?

With that exception the defendant rests at this time.

THE COURT: I would like to take this opportunity to ask both attorneys to verify with our Clerk and make certain that your record and also your understanding as to what papers have actually been received in evidence and agree with the official record of the Court and I will leave open to you if you find any difficulty or find that you inadvertently failed to offer any paper which you intended to offer, I will leave open for a reasonable time an opportunity for you to make such offer.

MR. MacCRATE: Thank you, your Honor.

THE COURT: That applies to both parties.

The defense rests.

Do you have any rebuttal testimony?

MR. MARKS: Yes, briefly.

From Mr. Learned's deposition, March 22, 1972 at page 334:

"Q Do you know the reasons for their insistence on that?

"A They wanted more plants built to help the economy of Puerto Rico and the only assurance they could have was that there would be money put. In addition to investing the profit we insisted on some minimum amount. We were agreeing to make another $55 million in addition to the core plant.

"Q Did you in fact make profit from the core plant?

"A I think that this ought to come from the records because the plant did not go into operation very long while I was an active officer of Phillips, but it's my judgment that it has made money. But, for me to try to conjecture on what the profits were, I have no record of this.

"I retired in November of 1967.

"Q The project was not completed when you retired?

"A I don't think it was in operation enough. I stayed on the board of Phillips Puerto Rico Core for a while after I retired as an employee of Phillips, and I also stayed on the board of Phillips, and I am very capable of saying that they made some profit, but to say the amount, I would not even attempt to.

"Q In fact, Core did reinvest in a satellite plant, did it not?

"A Yes.

"Q Was that a nylon plant?

"A It was a nylon plant, and I understand now that it has been doubled and that it's producing both nylon and polyester.

"Q Was that the only satellite in which the Core invested?

"A At the time that I was a member of the board of Core, it is, to the best of my knowledge.

"Q Was it contemplated that that particular investment would utilize the $55 million that Core or Phillips was committed to invest?

"A No. Maybe I'd better give you an explanation of why we went into the nylon plant initially.

"Phillips had tried to get satellite plants prior to the dedication of the plant and we decided that it would be good public relations and good relations with the Puerto Rico people to be able to announce at least a satellite plant at the time that the plant was dedicated.

"We had a commitment that if we didn't have something in six months of the start up we were going to have to build it anyway, so we had worked out a license agreement with a French company, and I can't tell you the name of it because I just don't remember it, but they were the people who probably had the basic nylon know-how.

"In fact, I think they even licensed duPont but in doing that licensing they had not included Puerto Rico so they licensed us and as I remember it, and don't hold me to this because my facts may not be right, but as I remember it they actually became a participant in the ownership of that plant and the Puerto Rican Government did not participate because the projections that were made was that the plant in its initial size would not be profitable.

"However, the intention was to materially increase it and the thought behind having taken that particular satellite as our first commitment of money was that the off-products from a basic nylon or any type of textile material were going to create the biggest number of jobs for Puerto Rican people.

"The opportunity for textile manufacturers to get the material in Puerto Rico and use Puerto Rican labor is what we were trying to accomplish at the time.

"Q For that reason you had received special permission to own a greater portion of that satellite than was contemplated under the agreement with EDA?

"A You better put it another way; for the reason that it was not going to be profitable, Puerto Rico decided they did not want to participate."

Now, I am going to read, your Honor, a section from the deposition of Kenneth Stanley Adams taken in Bartlesville, Oklahoma on January 17, 1973, page 3, line 17:

"Q Will you state your name, please?

"A Kenneth Stanley Adams."

Line 21:

"Q Mr. Adams, you were chairman of the board of Phillips from January 1, 1962 through September 30, 1967; is that correct, sir?

"A December -- what time did you say?

"Q January 1, 1962 through September 30, 1967.

"A I think that's the approximate time. I don't have the exact dates."

"Q And during the period from January 1,1962 up through April 28, 1964, you were also the chief executive officer of Phillips?

"A I believe I was, yes.

"Q Turning your attention to May of 1962, do you recall any discussion within Phillips of a proposal to build a refinery or petrochemical complex in Puerto Rico?

"A No, sir."

Page 5, line 21:

"Q Do you recall when a proposed project in Puerto Rico in which Phillips would participate first came to your attention?

"A It never came to my attention, to the best of my knowledge.

"Q In or about November, early November of 1962, did you have a discussion with Mr. Anderson, Robert Anderson?

"A No, sir.

"Q Do you recall whether you were in Chicago in about November 10th or 11th, 1962, at an American Petroleum Institute meeting?

"A Well, I never missed a meeting of the API in the last 20 years or so.

"Q Do you recall Mr. Anderson calling you during that convention?

"A No, sir. He never called me.

"Q Do you recall anyone mentioning to you at that time a Mr. Shippee or Prudential Oil Corporation?

"A No, sir."

Page 7, lline 17:

"Q Do you recall in Chicago, going back to November of 1962, discussing with Mr. Learned a telephone call from Mr. Anderson?

"A No, sir.

"Q Do you recall Mr. Learned ever having said to you that he had talked to Mr. Anderson at about that time?

"A No, sir.

"Q Do you recall having spoken to Mr. Anderson at any time during November 1962?

"A No, sir.

"Q Mr. Adams, this has been produced by your counsel, which is a book entitled'National Daily 1962' and I ask you, can you tell me whether this is a diary or appointment book which you kept during that year?

"A This is one that my secretary kept. I didn't keep it."

Line 23:

"Q I call your attention to the entry for Wednesday, November 7, 1962, particularly the words 'Robert B. Anderson called from New York' and ask you whether you recall speaking to him at or about that time?

"A I don't remember but -- if it's noted here, he no doubt called. Whether I talked to him is something else. I don't know."

Line 11:

"Q Turning your attention to January 1963, did it come to your attention that the International Department of Phillips was discussing a proposed petrochemical complex?

"A It didn't.

"Q And at that time, do you know who was the chief of the International Department? I am still talking about early 1963.

"A I don't recall, no.

"Q At that time, do you recall whether Mr. Learned ever mentioned to you a proposed Puerto Rican petrochemical complex?

"A No, he didn't.

"Q He didn't?

"A No."

(Continued on next page.)

Page 10, line 23:

"Q Do you recall at any time during 1963 Mr. Learned discussing with you a proposed Puerto Rican petrochemical oil refining project?

"A No, sir.

"Q Do you recall at any time during January, 1963 talking to Mr. Anderson concerning a proposed petrochemical project?

"A Never.

"Q In Puerto Rico?

"A No, sir.

"Q Do you recall ever discussing a proposed refinery or petrochemical complex in Puerto Rico with Mr. Anderson?

"A Never.

"Q Do you recall a proposed petrochemical complex and a proposed import quota into Puerto Rico which was to be obtained for Phillips by Oscar Chapman?

"A No."

Page 12, line 2:

"Q Do you recall discussing with Mr. Learned or any other executive of Phillips in 1964 that there would be a hearing before the Department of Interior concerning Phillips' application?

"A No, sir, never.

"Q Do you recall whether you knew in July of '64 that any Phillips executives were going to testify at a hearing before the Oil Import Board?

"A I didn't."

And at line 16:

"Q Do you ever recall discussing with any executive of Phillips a proposed import quota for Phillips?

"A No.

"Q Into Puerto Rico, I mean.

"A No.

"Q In 1965, in May of 1965, do you recall discussing a proposed import quota for Phillips?

"A No, no.

"Q Do you recall discussing whether such a quota had been granted?

"A No.

"Q You don't recall any discussion about a quota in May of '65?

"A No."

Then at page 15, line 4:

"Q Did you customarily speak to Mr. Anderson in 1963 as often as once a month?

"A Oh, I would say yes.

"Q Was it --

"A I don't know -- yes, I would say once a month or once every two or three months. In '63?

"Q Yes.

"A Yes.

"Q Was that the same in '64?

"A I -- I'm not -- not to the extent that I believe I did before, no.

"Q And were these conversations usually by telephone?

"A Generally, yes. Generally.

"Q Do you recall in any of these conversations discussing the Prudential Oil Company?

"A Never, neard heard of it.

"Q And, you didn't, I gather, discuss Puerto Rico in any of these discussions?

"A No, definitely.

"Q Do you recall coming to Mr. Anderson's office in New York at some time during 1966 with Mr. Learned?

"A No, sir.

"Q Do you recall whether you did or do you recall that you didn't? I would just like to clear the record.

"A I didn't.

"Q You didn't?

"A No, sir.

"Q Did you speak to Mr. Anderson at any time during 1966, do you recall?

"A I would think that I talked to Mr. Anderson or would visit with him?

"Q Did you go to his office?

"A I would say that I was there once or twice possibly during '66 or '67. It was getting pretty scarce at that time.

"Q And did you ever go during that period with Mr. Learned?

"A I may have. I don't remember whether or not I ever went with Mr. Learned -- Mr. Learned was with me at any time in his office or not. Offhand, I will say not, but it may have been. I don't know why he would go there. I'd say no.

"Q Do you recall ever attending a meeting at which both Mr. Anderson and Mr. Learned were present?

"A Never.

"Q On any subject whatever?

"A Sir?

"Q On any subject whatever, not only --

"A No.

"Q No meeting?

"A No. Not that I recall. Because -- off the -- that's right."

And then page 18, line 9:

"Q Do you recall whether you visited with Mr. Anderson in his office prior to that operation, say in 1965?

"A No, I didn't. I would say definitely not in "65.

"Q Do you ever recall telling Mr. Anderson either in a conference or over the telephone that Phillips wanted to pursue an independent course with respect to a proposed Puerto Rican petrochemical complex?

"A Never.

"Q Never?

"A No, sir.

"Q Or words to that effect?

"A No, sir.

"Q Mr. Adams, I show you page 44 of the transcript of Robert Anderson, and I call your attention to the answer beginning between lines 17 and 18. On the left-hand margin, there are numbers.

"A Oh, I see.

"Q Do you recall the conversation that Mr. Anderson is referring to?

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"A I never had one ."

That is all we have, your Honor.

MR. MacCRATE: Reading on page 17, line 15:

"Q And that was at his office in New York?

"A I couldn't verify it, whether it was telephone or whether or not it was a visit.

"Q I see. But at none of these meetings did you discuss Puerto Rico or --

"A I would say in '66, the possibility of me being in his office was practically nil, for the reason that I had a new aorta put in my body in '65 and I was really out for quite some months and months and months, and my trips became very few and far between. I wasn't active in the company and I had retired and -- I had the first big operation that I had in my life, and they didn't think I was going to live. And so I really was slowed up.

"I shouldn't have mentioned that. But fortunately, I had a hell of a good doctor, Dr. Denton Cooley at Houston."

And I would state for the record, your Honor, that when this deposition was taken in January of 1973 Mr. Adams had reached a ripe old age. I do not know his precise age, but he has since died.

MR. FARRELL: Your Honor, if we are going to

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go into that, I propose to read Court's Exhibit No. 5 as to the condition of Oscar Chapman.

THE COURT: Well, let's finish with Mr. Adams first.

Is it stipulated for the record that he is now deceased?

MR. FARRELL: Yes, it is.

THE COURT: What can be stipulated with respect to his age? We had one witness here who was in his early 60's who seemed 20 years older. I don't know what determination can be made that a man had a ripe old age.

MR. JEMISON: Your Honor, Mr. Adams retired in 1964 at the mandatory retirement age of 65.

THE COURT: All right.

Can that be stipulated for purposes of this trial?

MR. FARRELL: Certainly, your Honor.

THE COURT: All right. He was 65 in 1964.

MR. JEMISON: Yes, your Honor.

THE COURT: Very well.

MR. FARRELL: I would like to read the Court's Exhibit 5.

THE COURT: Are you all finished with Adams?

MR. FARRELL: Yes.

THE COURT: All right, you may continue. What exhibit number is it?

MR. FARRELL: Court's Exhibit 5.

THE COURT: Wait just a moment.

MR. FARRELL: This is the only copy there is.

THE COURT: What was the date of his --

MR. FARRELL: 1972, your Honor.

THE COURT: Of the interrogatories?

MR. FARRELL: Yes, June '72.

THE COURT: Any objection to reading this?

MR. MacCRATE: Yes, your Honor.

THE COURT: It is an exhibit for identification, gentlemen. It is not in evidence.

Would counsel approach the side bar, please.

(At side bar.)

THE COURT: I would permit you to read the interrogatories as to Chapman concerning his health at the time that he answered the questions.

MR. FARRELL: This goes back to four years. It says he has been under a doctor's care since "67.

THE COURT: This is not part of my trial record. This is marked as a Court's exhibit for identification, to make a record of the basis upon which the Court acted or commenced to act on an application made during the course of the trial which later was mooted, and I don't really consider it is in evidence for purposes of this jury.

Much the same information is in the Chapman interrogatories as to his health, and that particular part I would permit you to read in if you wish. I think that will give you the same result, but I don't regard Exhibit 5 for identification as being proper to read from.

MR. FARRELL: Let me look at the interrogatories.

Your Honor, I want to read both. They are inconsistent.

THE COURT: I don't really regard them as inconsistent and to the extent that it is relevant to his health at the time he was examined was relevant. This Exhibit 5 for identification is only relevant on whether he should have been deposed. The man is clearly in the Washington, D.C. area which is more than a hundred miles from the trial and he is not a party defendant. Also, that is a fact I don't understand in itself, why he is not.

But be that as it may, I will permit you to read Question 3 from the interrogatories and I decline to allow Exhibit 5 for identification to be read over objection.

MR. FARRELL: I think, your Honor, I will let it go.

THE COURT: All right.

Did you want to say something, Mr. Rigney?

MR. RIGNEY: No, your Honor. Excuse me.

THE COURT: All right.

(Open court.)

MR. MARKS: That is all for the plaintiff, your Honor.

THE COURT: Both sides rest?

MR. MacCRATE: Yes, your Honor.

THE COURT: All right.

MR. RIGNEY: Your Honor, excuse me. Through an omission we neglected to refer to three final interrogatories that we would like to be part of the record. I believe Mr. Jemison has them to indicate to you.

MR. JEMISON: If we could have just a moment, your Honor?

THE COURT: All right. I don't think I need to hold the jury while we resolve this.

At this time, members of the jury, will you please return at 10.15 tomorrow morning.

You may withdraw from the courtroom.

(Jury left the courtroom.)

THE COURT: To reiterate, gentlemen, you can straighten out your exhihits and if there has been any problem of inadvertence or any disagreement between the Court's records and your own, I will permit you to reopen to offer exhibits on that basis.

But for those two matters, as I understand it, you have now both rested.

MR. FARRELL: Yes, your Honor.

MR. RIGNEY: Yes, your Honor.

THE COURT: Perhaps to save time I would simply permit you to be deemed to have made whatever motions you want to make or you may make them for the record briefly. I propose to send the matter to the jury.

MR. FARRELL: I think, your Honor, that is appropriate, and you may deem that the motions were made.

THE COURT: All right.

Any motions permitted by the rule to be made at this time are deemed to be made and denied without prejudice to be renewed after verdict.

Will that be acceptable to all of you?

MR. MacCRATE: That will be, your Honor.

MR. FARRELL: Yes, your Honor.

RHE COURT: Now I will have the Rule 51 conference with you beginning in about five to ten minutes.

MR. FARRELL: Thank you, your Honor.

THE COURT: Off the record.

(Discussion off the record.)

(Recess.)

(In the robing room.)

THE COURT: My purpose at this time is to outline for you the general thrust of my proposed jury instructions so that you can prepare your summations knowledgeably.

However, I do not bind or commit myself to the extent that I would not be able to meet any unusual or unforeseen matter which may come up in the summations, or to ad materialness to place my instructions in the proper context, viewed against whatever may be said.

I also received some of this material rather late, and I have not completed it entirely. I am working on a proposed form of verdict, special verdict, and I probably will have that for you either tomorrow or Monday. I don't think that's essential at this time.

MR. FARRELL: Your Honor, just in that connection, we received yesterday defendant's proposed special interrogatories and last evening we prepared counter proposed ones, which I would like to give you.

THE COURT: I wish you had given them to me at 10 o'clock this morning.

MR. FARRELL: I'm sorry, your Honor. They did not come down until court was in session.

MR. MacCRATE: Your Honor, I am even more delinquent than that. I find that I was in agreement with

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what we submitted yesterday, and I had some revisions that I was hoping to submit to your Honor, and I apologize for this.

THE COURT: All right, hand them over. Can they be identified for the record in some fashion, so I know what I had before this conference and what I'm receiving now?

MR. MacCRATE: What I have, your Honor, has my handwriting on it. It is something I could dictate, but I cannot give you a clean copy until I have returned to my office.

THE COURT: I will take your handwriting.

Off the record.

(Discussion off the record.)

THE COURT: May the record show that Mr. MacCrate has indicated to me that his requests relate only to the special form of interrogatories to be submitted to the jurors, and I will take that as soon as you can give it to me, either in handwritten form or any form, but I don't think I need to take that up with you now.

You will both have an opportunity to be heard before we reach that.

Any exception taken now will not have to be repeated after the charge is given, and you will be deemed to have an exception as to any written requests which the

Court declines to charge.

I will outline generally the charge.

I will first point out to them the importance of their function and their duty to find the facts as to which their exclusive, and their obligation to follow my instructions on the law, and that they must consider the case as between persons of equal standing, and each entitled to the same fair trial and a corporation entitled to the same fairness that a private individual would be entitled to, and to treat them the same as if they were persons.

That anything I say about evidence is not controlling on them, if it doesn't agree with their recollection, they are to disregard it.

The same goes for the attorneys.

I will tell them that I'm neutral, and that the attorneys were performing their duty during the trial, and they should disregard any exchanges or anything like that; that I have no opinion concerning the issues. It is not a contest between the lawyers, it is a case between the parties to be decided on the merits, according to where the truth and justice lie.

They should use their common sense and be fair. If I say anything about damages, that should not indicate that the plaintiffs should recover damages nor should it indicate what amounts the plaintiff should recover.

I will then define burden of proof by the preponderance of the credible evidence.

It doesn't mean the greater number of witnesses or the greater time taken or the greater number of documents. But it refers to quality.

That the criminal standard of proof beyond a reasonable doubt does not apply here.

I will then define direct and circumstantial evidence.

And then I would discuss credibility in and the weighing of evidence. No magic formula to evaluate testimony. They use their experience in their every day life. They consider interest. A person who is interested is not necessarily unworthy of belief, but this is a factor or possible motive.

Consider bias or favor, if any there may be. They can consider the demeanor, the opportunity the witness had to observe the facts. Whether he had any motive to lie.

If they can reconcile differences by fitting the testimony together, they should do so. If not, they should determine which of the conflicting versions they believe.

They may consider whether a witness is corroborated by documents or exhibits or the testimony of others;

whether his testimony is consistent or inconsistent with prior actions shown in the exhibits or testimony taken before this trial and read to them now.

Interest may be established by reason of ownership interest or employment by a corporation which is a party or any continuing agreement to provide services and receive a fee.

There's been some evidence that certain witnesses notably Messrs. Willey, Young and possibly others, have an agreement whereby they receive a portion of whatever recovery Prudential would receive if it prevails in this case, and this evidence, if believed, would indicate they have an interest in the outcome of this litigation.

But I will tell them merely because a witness has an interest in the outcome, doesn't render him unworthy of belief, but they may consider this interest as one factor among others in determining the weight they will give him.

Then I would refer to the depositions and explain the procedure, and tell them that testimony given as evidence in chief by way of reading a deposition is entitled to the same considerations as if a witness had been present and testified. Also, that a witness who testifies may be confronted with the testimony he has given on a prior occasion. And I will quote from Rule 32 of the Federal Rules about impeachment, and tell them that testimony is said to be impeached when it is rendered unworthy of belief.

And in judging the credibility of a witness, they may consider whether the witness testified in a different or contradictory way in connection with his sworn testimony on another occasion.

Simply because he did doesn't automatically mean that he was lying at this trial or that his testimony in this case should be totally discarded by you. Instead, you are to consider the nature and extent of the apparent contradiction if there be one, and you are also to consider any excuse or explanation given by the witness as to why or whether he testified inconsistently on a prior occasion.

And you can consider whether it was recent, whether it was closer to the events, and whether the witness had an interest in testifying differently here than he did on the prior occasion. And after considering all of the surrounding circumstances, they must determine whether the prior testimony does in fact discredit, contradict or impeach. And here again, it is entirely for their determination in all matters concerning truthfulness, credibility and the weight of the testimony.

Then I would explain to them that a witness who is a party or has an interest in the outcome admits a fact or facts against his interest by statement or other conduct, then such statement or other conduct if knowingly made or done may be considered as evidence of the truth, and- such admissions are entitled to such great weight; strongest sort of evidence against the party making the admissions.

I would then instruct them what we have always been brought up to understand was falsus in uno, and that this doesn't apply to an innocent mistake.

I would then explain to them about the charts, they are not independent proof but are permitted to assist them in understanding the other charts.

I think we ought to have the numbers of those charts and I would like to get that in writing from both of you.

They are visual aids that are used but they are not in themselves evidence.

Then I will tell them about the experts, that they may reject the expert's opinion if they find the underlying facts different from those which form the basis of the opinion and they may give the expert's opinion such weight as they think it deserves.

If they find the expert is not sufficiently skilled or learned in the area in which he is testifying to justify valuing his opinion as an expert, they may disregard his opinion entirely and also disregard it if they disagree with it.

They are not required to accept it to the exclusion of facts and circumstances disclosed by other testimony. They must consider it but it is not controlling.

I would then state, and I might tell you right at this time in view of the extensive time I have given for summations, I do not propose to marshal the evidence.

I will state briefly as I can what the contentsions of the parties are and then I will state the contentions of the plaintiff that through the efforts of its officers and agents, Mr. Shippee and Mr. Willey and Mr. Young, Prudential Connecticut developed and possessed a leally protected business concept relating to the development of a Puerto Rico Core facility to be built in Puerto Rico.

Then I would explain about the foreign oil quota importation and the contention of plaintiff that Phillips, using the concept which Prudential developed and disclosed to Phillips, was able to procure the oil import quota and develop a Puerto Rico facility along the lines of that Prudential concept.

Then I will mention the separate theories but I will tell them certain elements which would be of concern under one theory but not under another and certain issues which are common to all of plaintiff's theories.

The plaintiff may prevail in this lawsuit if they are satisfied as to any one of his theories and they will be given a special form of verdict for the purposes of answering the questions posed by the different cumulative theories presented.

Then I will go into the elements of misappropriation and I will charge the four elements which the defendants request -- defendants request 10.

I will then attempt to them the various elements of misappropriation and I will state the components of the claimed concept as they were stated on the record in this trial by Mr. Farrell and I will tell them that a legally protected business concept may be judged as a form of property and as such its owner is entitled to protection.

I will state Phillips contends there is evidence in the case that the concept which Prudential claims to have conceived was in fact conceived in whole or in substantial part by persons not affiliated with Prudential.

Is that the contention going to be made? Do I have it correctly?

MR. MacCRATE: Your Honor, I was just making a note with respect to what you stated as to the plaintiff's claimed concept and the fact that you were basing it upon counsel's statement of the concept.

THE COURT: I am not going to tell the jury that but that is where I am taking it from. Counsels' statements are not evidence but that is what I understand to be their position in the lawsuit.

To save time in this conference I incorporate by reference what was finally stated on the record here.

Is that unclear for some reason?

MR. MacCRATE: Well, I believe that counsel's statement does not, I would contend, accord with the proof and so I would request that the charge indicate there is an issue in that regard.

THE COURT: As to whether they developed it?

MR. MacCRATE: As to what in fact were the concepts. There is a difference between counsel's statement of the concepts and the parties on the statement of the concepts.

THE COURT: We have some issues to be tried set forth in this case, don't we? And we still have a rule remaining that you recover following your allegations, isn't that so?

MR. MacCRATE: Yes, your Honor.

THE COURT: Doesn't counsel's statement differ materially from the issues to be tried as stated here?

MR. FARRELL: No, your Honor.

MR. MacCRATE: I am not aware.

THE COURT: If it is not a material variance I would assume that he is deemed to have amended his pleading to his proof. If he doesn't prove what he says he proved, that is a question for the jury and he cannot prevail.

MR. MacCRATE: All I wanted to be clear on was that there was an issue as to what was included in these concepts.

THE COURT: If anything.

MR. MacCRATE: If anything.

THE COURT: I am sure the summations will make that abundantly clear to the jury.

MR. MacCRATE: I did not want to be running in the face of your Honor's statement as to what those concepts embraced.

THE COURT: I have page 7 of the defendant's requests and I do not believe that the statement therein contained is materially different from what I understand to be what this trial is all about and from what was verbalized by Mr. Farrell.

MR. FARRELL: Your Honor, I would only say that the final paragraph of page 7 is not a fair representation of plaintiff's contentions. We said it on the record, we must have said it at least twice. This is not a fair statement of our contentions. It is obviously open to Mr. MacCrate --

THE COURT: What is there about it that differs?

I don't have right in my hand --

MR. FARRELL: Your Honor, we had four. We had the lack of necessity for a prior commitment.

THE COURT: I am taking it from page 1103 of the transcript.

MR. FARRELL: Fine.

THE COURT: But I don't gather there is anu great variance from what appears on page 1103 and the statement of issues to be tried that Mr. MacCrate has in his requests.

MR. FARRELL: I think there is some difference but if you take it from 1103 I am satisfied.

THE COURT: Perhaps you can pinpoint the difference. If I don't understand I would like to know.

MR. FARRELL: Mr. MacCrate has two concepts and we had four. When Mr. MacCrate expressed the question and says public utility, we had more than that and those are the major differences.

Obviously, if we don't prove them we can't prevail but I want to state them as to what our contentions were and I don't think that is a fair statement.

MR. JEMISON: I was just going to say that the concepts outlined to the Court are the concepts which you claim were evolved by the plaintiff?

MR. FARRELL: What I said is on the record and that is what I am contending.

THE COURT: I also understood it but I have not understood it to be materially at variance with any statement made by Mr. MacCrate or anything contained in the pretrial order.

MR. FARRELL: Maybe one gets wound up in one's own case. You may be right but I do think it would be preferable to take my statement of my contentions.

THE COURT: Is there a substantial difference? It may be called to my attention and I will gave to consider whether I will do that or not. But I believe with the jury the question for their determination is as to whether Prudential acting through its officers and agents conceived of an idea and if they find the concept was not conceived by Shippee, Willey or Young but rather were products of efforts by Chapman, Coan, Brown or others, Prudential would not be a party to the concept and not be entitled to seek damages for its use or misappropriation.

I would then go on to the question of whether the concept is legally protected and I am adapting plaintiff's request and restatement, a comment about a statement of torts, Section 757 may consist of a plan, idea or compilation of information which may be used in one's business which gives a benefit, opportunity or competitive advantage over another, must be for continuous use of the operation of the business, must be original and must be Prudential's.

But it need not be novel in the sense that it is sufficiently imaginative to qualify for protection as an invention under the patent laws. The requirement of originality may be satisfied even if some or all of the elements of the concept are known generally or known to persons in the industry, if stringing the idea together was original.

The idea would still be original if after its disclosure persons inthe industry believed it to be obvious based upon what was previously known.

Likewise the idea would still be original although persons other than Shippee, Willey and Young were capable of conceiving it.

I also add as an element that it must be secret. However, you don't relinquish secrecy by disclosing it to another party under circumstances in which you believe the other party will treat it as a matter of confidence.

I will tell them a factor for their consideration in making this conclusion extends to information which was known to persons outside Prudential and this again is part of the restatement of comments previously mentioned.

Second, the steps or measures taken by Prudential to guard the secrecy of it and, third, the value of the information to Prudential or anyone interested in developing a petrochemical facility in Puerto Rico.

Four, the amount of time, effort or money expended by Prudential in developing the concept and, fifth, the ease or difficulty with which the information could be lawfully acquired or independently developed by others.

That also relies in part on the speed dry chemical products against Carter, Inc. It must be reduced to some tangible form, it is not enough if it was vague, uncertain and undeveloped.

And as I understand it you contend, Mr. Farrell, Exhibit 214 constitutes the presentation of the concept, is that right?

MR. FARRELL: 214 and 215 is the presentation.

THE COURT: What is the difference between 214 and 215?

MR. FARRELL: One is a later draft.

THE COURT: I see. As I understand it, Phillips contends the idea was not developed in a concrete way in the brochure and was expressed in vague and indefinite way, not susceptible of specific understanding or use and, in any event, it was not original with plaintiff.

Is that a fair statement the way you stand, Mr. MacCrate?

MR. MacCRATE: Lacking in novelty. Not useful.

HE COURT: All right.

I define in the charge it must be novel. In fact, I intend to charge to the contrary, although novelty bears on its value. The usefulness I suppose comes into a different area of the controversy.

Then I will tell them it is necessary for plaintiff to prove that the defendant used or appropriated the concept with the idea actually used by the defendant different from and not suggested by or derived from any concept received, formulated or developed by plaintiff, then they must find for the defendant because there is no appropriation.

I will also tell them that if they find that Phillips' brochure, Joint Exhibit 45, copied verbatim idea from Prudential's brochure, that may be some evidence of Phillips' use of Prudential's concept, but they need not find Phillips used Prudential's precise words in their document which it thereafter called its own.

MR. MacCRATE: Does your Honor include at that point any definition of materiality of use?

THE COURT: I haven't used the word materiality but I think in my definition of concept I have said that the concept had to be valuable in that it had to give a business opportunity or competitive advantage. Implicit is that it has to be material.

MR. MacCRATE: But I am directing myself to the quality of the use of the idea.

THE COURT: I am using the word substantial in connection with use. I think material is a harder word for jurors to understand than substantial.

If any of you see any significant different between the two words, I will consider changing it.

MR. MacCRATE: I would respectfully request a charge with respect to an immaterial use.

THE COURT: What would you seek with regard to the immaterial use? I suspect immaterial use is important in the area of damages.

If they appropriated something that was immaterial, then the damages suffered by plaintiff are minimal but as I told you earlier in the trial, I think simply infringing the common law copyright which they probably enjoyed in Exhibit 215 would give rise to some kind of claim. It might not be sufficient to amount to any money but it would still be tortious.

MR. MacCRATE: The brochure that was copied was an application that was described as an application for an oil import quota. The document into which it was copied was a document submitted to the EDA authorities.

That portion of the document that had any of the offending language was totally discarded and the superseding document had none of the offending language.

That superseding document was the one that was submitted to the oil import authorities.

THE COURT: Isn't it a reasonable conclusion that taking plaintiff's work, using it in conferences with EDA and discarding it is still some invasion of plaintiff's right? It may be so insignificant as to be de minimis but it is still tortious and I don't see any significance of the materiality aspect of this controversy except when you come to damages.

If they made minimal invasion of his rights, the damages would be minimal, but I don't understand any requirement that if there was misappropriation of a concepr, and I am not using the word trade secret at any time during my instructions, but it is analogous to a trade secret, simply to say the trade secret was not material or not material or of no value is something that only pertains to the damage aspect of the tort.

MR. MacCRATE: I would have thought, your Honor, that the mere copying of language in a way that has no legal effect in itself would not create a tortious deed.

THE COURT: That assume that the language was tendered under a confidential relationship, you see. I don't think that is what we have here. We have something like a chain of ideas and plaintiff contends some of its ideas were emboided in the final project as implemented by Phillips.

MR. JEMISON: Your Honor, the plaintiff has sought recovery on the basis of concepts, not on the basis of material used by Phillips.

THE COURT: That is certainly true but they are relying on the use of the language as some circumstantial evidence that you took their concept.

MR. JEMISON: I think so long as it is restricted to a material concept, used in a substantial manner --

MR. MARKS: They just want to put in adjectives.

THE COURT: I have some adjectives and all I have to give you is a general outline of the legal theories which I intend to present to the jury. I do not limit myself by what I say here as to what adjectives I will use. I might tell you on the record if anybody gets too far out in their summation I may crank in better adjectives or take out some. I have a duty to see that this matter gets a balanced presentation to this jury. My discussion here with you, I don't limit myself to what adjectives I will or will not use.

Then I will define the elements of breach of confidence. Ordinarily people dealing at arm's length, each seeking the best arrangement, you don't have a confidential relationship.

However, a party evaluating a proposal or worth of a particular business transaction or proposition offered by another, often requires certain information in order to be able to decide if it is interested and if P4udential disclosed a legally protected business concept, Phillips is not entitled to make use of the idea. But if Phillips considers the suggestion and enters into no agreement for the development of the concept, then the ordinary arm's length business relationship would be transformed into a confidential relationship imposing on Phillips the obligation not to use the concept that had been disclsoed to it. That is the famous Strauss Stores case wiich we discussed earlier. Confidential relationship may be created by conduct without express agreement.

I will state that Phillips's contentions as being they deny any confidential relationship existed and that Prudential voluntarily offered its proposed plans in an effort to gain Phillip's assistance with respect to certain technical matters. That is request 20 of the defendant's last paragraph.

MR. MARKS: Your Honor, in that contention do you make reference to the fact that nothing was disclosed to Phillips prior to the receipt of Mr. Learned's letter saying they would counsel and assist?

THE COURT: No, I do not discuss that and I am sure you will make it clear in summations. At least I don't plan to do it.

Then I am going to the second theory of aplied contract and I will define the difference between express and implied contracts. Plaintiff's request No. 7 adapted.

Then I have defendant's request No. 24 substantially. Defendant's request 26.

There is no requirement that this disclosure be made as a result of a confidential relationship.

However, you must find that by their actions the parties may be presumed to have reached an agreement.

Then I will take plaintiff's request 7, in substance, and take substantially all of defendant's request 28.

They are to look the the party's intentions in their words and acts and not to any undisclosed intention.

Persons' secret intent has no bearing that's set forth in defendant's 29.

Then I will go to the quasi-contract theory and will explain a contract implied in law may arise in a situation between the parties where it would be inequitable or unfair by virtue of breach of confidence or some similar equitable violation for defendants to profit from the use of something that was given, but the mere fact that one party benefits is not sufficient to require them to compensate the other party for that benefit. Plaintiff must demonstrate the defendant has acquired these benefits wrongfully through breach of confidence or misrepresentation.

Then I will take plaintiff's request number 6, adapted.

Plaintiff must show that Phillips benefitted in measure from Prudential, his contribution. And here it is not necessary to find that it was novel or secret.

They must find, however, that contribution that was made was the contribution of Prudential Connecticut or Shippee or Willey or Young and not a contribution made by others unaffiliated with Prudential.

I will then complete the instructions by referring to the issue of damages, and I decline to charge the first page of plaintiff's request number 9, but I will tell them that they use their common sense and their experience in fixing the amount of damages, if they find there is an entitlement to damages.

As to the breach of confidential relationship or the contract implied in law, I will instruct them that the damages would be what the defendant actually profited from the use of the concepts.

I expect to tell them, and I don't use it in quite these words, I will attempt to show some delicacy about it, but in spite of the way the testimony has gone here, Phillips did not steal the refinery from Prudential. The most they stole was the concept, and the concept taken together with a thousand other things are what made this refinery successful, and I am going to try to put that theory in words for the jury; that damages are attributed to the profit from the taking of the concept and not from the profits of opening a refinery in Puerto Rico.

That will be a little difficult to verbalize, but --

MR. FARRELL: I will probably except to it, no matter how you verbalize it, and I thought I'd note that for the record now.

THE COURT: A lot of things combined to make this possible:

Chapman's efforts, the efforts of the EDA, Phillips' standing as a recognized importer, which apparently nobody contested under equal protection grounds, many other things, and the unjust enrichment from taking the concept, viewing all the evidence favorably to the plaintiff, plaintiff is certainly entitled to collect, but they can't claim that the entire refinery complex was stolen.

MR. MARKS: We will definitely except to that because our theory in this case has been, from the beginning, that without the concept there'd be no oil import quota and without the oil import quota there'd be no refinery, and no profits. Everything flowed from the concept.

THE COURT: I gave you my example about where the furniture manufacturer converts the wood into furniture by taking it from stolen timber, and he cuts it up and makes furniture out of it. He has been unjustly enriched, but the entire value of the furniture is not attributable to the lumber that has been stolen.

MR. MARKS: That's not analogous to this situation, I'm afraid, because our position is without the utilization of these concepts, Phillips wouldn't have gotten to first base and they can't then make profits if they utilized the concepts, and then attribute them to something else, if they flowed from the use of the concepts -- that is, it is a chain, and you cannot --

THE COURT: You see, if I only have cement, I can't make concrete without having gravel and water, and let's assume that you supplied the cement, somebody else supplied the gravel and the water, and the concrete that resulted is not entirely attributable to the supplier of the cement. And the jury has to use its common sense in that area.

MR. MARKS: But in the Strauss Stores case, where you talk about putting TCP in cans, it wouldn't have been a defense in that case to say, yes, we stole the idea about putting TCP in cans, but then we put up a big plant to manufacture cans, to put the TCP in it, and the plaintiff whose idea was stolen can't recover the profits from that.

I think the clear implication --

THE COURT: He can recover the profits

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attributable to his concept, as I view this matter, but I think under the circumstances of this case, a great many things combined to give effect to this core refinery, and that to say that all of the profits of the core refinery for the balance of a life of the import quota are the damages that can be awarded to this plaintiff is simply unsound law.

I don't know how I can state it any more strongly than that.

MR. MARKS: We respectfully except, your Honor, because the cases seem to indicate the contrary.

THE COURT: Well, I will attempt to formulate it in a fair and restrained fashion. I have been giving it to you in shorthand here, verbal shorthand.

And I must say that your own theory of the case, your own expert said that their share of the profits or of the enterprise, would have been computed only by the negotiation, you see. Your own demand was only for 27-1/2 percent of the future profits, the equity position.

MR. MARKS: That's correct, but the future profits, we now know on the record from Phillips' witnesses what they anticipate they will be.

THE COURT: And the jury, if they agree with you 100 percent, should give you the fair portion of that profit or that value which is attributable to your concept misappropriated by the defendant, and not all of it.

MR. FARRELL: Oh, no, no. Not the entire profit.

THE COURT: All right. I'm going to try to verbalize that in a proper fashion for the jury.

Did I cover the profits on the implied contract in fact? Of course, they are the market value of the concepts at the time they were taken.

I regard interest as being for the Court, and I will not instruct them to award the interest. I decline to charge request number 10.

MR. MARKS: Your Honor, that was designed only to determine a date of breach for the purpose of attributing interest, our understanding being that that was, in terms of the date of breach, that that was a matter for the jury.

THE COURT: Is there any dispute about the date of breach?

MR. MARKS: We believe it would be April or August of 1963.

MR. FARRELL: I think the latest date would be August of '63.

THE COURT: Didn't you have to have a demand and a refusal?

MR. MARKS: Not under our concept where they took our brochure and ran with it starting in August of '63.

MR. FARRELL: Especially in view of the testimony that it was our thought that we had a joint venture at that time. Quite aside from the legality of the belief that we had a joint venture, if we thought we had a joint venture there was no need to make a demand; therefore, if in fact Phillips had from August '63, when they met with Mr. Chapman, decided to go ahead on their own, I think that's the day they breached.

THE COURT: We have testimony here that this brochure was turned over by Chapman to Conn, as I understand it. The minute Conn took it back with him to New York, I suppose he, in effect, effected the misappropriation and that date is really not in dispute.

MR. FARRELL: No.

THE COURT: However, I regard interest as being for the Court, and I think it presents a difficult problem in this case because there's been so much delay before and after suit, and I can't really at this point attribute that delay to anyone particularly --

MR. FARRELL: Judge, during all that period Phillips had the money. It is not as though we were penalizing them.

THE COURT: Now, I decline to charge fraud in the sense submitted by plaintiff's requests or to any extent, and as I told you earlier, I do not propose to summarize or marshal the evidence.

Request number 1 of plaintiff is granted in substance.

I've already covered the question of the confidential relationship and to the extent not charged, number 2 is declined.

Number 3 is declined, except as I previously stated to you. But I do agree that they do not have to show they were novel or unique or patentable and will so charge.

I decline number 4 in the form submitted but will explain circumstantial evidence.

I will charge request number 5, probably with not so much emphasis solely on Anderson, but I will explain agency relationship to them.

We will be in recess until 3:45.

MR. FARRELL: Thank you, your Honor.

(Adjourned to 3:45 p.m.)

(4.10 p.m.)

(In the robing room.)

THE COURT: I have already explained my instructions with quasi-contract, No. 6 and have substantially followed that. I have gone over this already with you.

I decline to charge No. 8.

I have explained to you my charge with respect to damages adequately already and have given my ruling with respect to request No. 10.

No. 11 is adopted in substance and No. 12.

On 13 I am reluctant to instruct that Prudential is the real party in interest. I believe it might be appropriate to instruct that this plaintiff is not suing in the right of Anderson or Wright but there really is no evidence that the claims of Prudential Connecticut are not vested in Prudential New York.

MR. FARRELL: That is true, your Honor.

THE COURT: What do you say about that, Mr. MacCrate?

MR. MacCRATE: With respect to a joint venture I think there would be a real question as to the assignability of a joint venture.

THE COURT: That is out of the case.

MR. MacCRATE: That being out of the case, I think with respect to a --

THE COURT: There was a breach -- I don't have to go into it.

MR. MacCRATE: I would think a claim of this nature would pass among the assets but I think it is substantially complicated here by the positions that the principals have taken and the ruling that your Honor made back at the close of plaintiff's case I thought would be a part of what the Court would instruct upon.

We did not request a charge in that regard because I had understood at the time of that ruling that there would be a statement with respect to it.

THE COURT: I will review that ruling and if I promised I would make a statement, I will do so.

MR. MARKS: I'm not quite sure I know what the point is but perhaps when your Honor has reviewed it you might let us know because I don't think there is any issue on this point based on the claims that remain in the case.

THE COURT: I think I did say that as a matter of law Prudential New York or Prudential Connecticut has no basis to assert any claims arising out of the efforts of Wright or Anderson.

MR. FARRELL: That is correct.

MR. MARKS: We are not making any statement to the contrary.

THE COURT: I don't know if there is any evidence in the case that they are not the party entitled to sue or the real party in interest as far as concerns Shippee, Willey and Young. The three have already testified and I think they are estopped to claim that right belongs to them.

MR. FARRELL: That is right.

THE COURT: Have I missed something that I mentioned before?

MR. MacCRATE: You mentioned before that it was, as I understood it, only as far as the claim related to the concepts and efforts of Shippee, Willey and Young, that it would be a proper basis for any claim.

MR. JEMISON: Your Honor, requested instruction 12 of the defendants --

THE COURT: I will come to those in a minute or two.

MR. JEMISON: That makes a reference to that point.

THE COURT: Plaintiff's No. 14 is proper and should be charged.

I decline to charge 15 in the absence of a showing there is a particular witness who was equally available to both parties.

MR. MARKS: I would point out on this point Mr. Keeler certainly is available to Phillips and not to us.

THE COURT: Mr. Keeler was deposed, wasn't he?

MR. MARKS: Yes, he was. He was also on the witness list for Phillips.

THE COURT: Just putting somebody on a witness list doesn't require you to call him. I am afraid we get too much of that. I see no basis to instruct with respect to Keeler and I don't think there is anything Keeler could have testified to that would have been any more than cumulative.

I have explained my expert witness charge to you already.

(Continued on next page.)

With respect to plaintiff's supplemental requests, I don't think there is any real issue of access in this case, and I assume that can properly be covered, all of the content of this request can properly be covered in summations.

As to number 18, I decline to so charge.

MR. JEMISON: Your Honor, in closing argument, I assume plaintiff would not be permitted to refer to production of document issues?

THE COURT: I am taking the position that the production of document issues has no relevance.

As far as the people whose memory has improved since they gave their deposition, I think that is a fair area for comment, but the document production is not relevant in this area. It is not relevant as to credibility of the witness who testified.

MR. MARKS: Your Honor, I take it from your previous statements that we need not take exception to specific charges.

THE COURT: As to any written requests which you have made which I have declined, you do not need to take any exception.

MR. MARKS: Fine.

THE COURT: That is the extent of it.

However, Mr. Marks, anything you beyond that, you take it now or take it later; either one.

I will now return to defendant's --

MR. MacCRATE: Your Honor, with respect to request number 17, that you indicated that you would grant, that is being left to summation, number 17?

THE COURT: Wait just a moment.

Yes, 17 is declined to take, simply because I believe it is a proper matter for discussion in the summation. I have covered the legal principal of agency and the legal principal of admissions. That I am covering, as I already previously said to you. And I have declined - 18.

MR. MacCRATE: Thank you.

THE COURT: I have explained to you my charge with respect to defendant's 1, 2, 3 and 4, all of which I think are probably covered in substance, at least.

As to number 5, I would give that if requested. I don't know that it is too relevant in this type of a case, but I will give it if you really want it.

MR. MacCRATE: I would like to have it, your Honor.

THE COURT: All right.

I have discussed my analysis of the plaintiff's claims which is embodied in 6, and I have already given you the basis for my instruction as to that.

MR. MacCRATE: In that regard, your Honor, during the recess, in discussing what your Honor had indicated, we thought perhaps that there was an aspect that had not been dealt with, and that related to the difference between the scope and extent of the project, the concepts for which plaintiff claims and the scope and extent of the project that was actually put into effect by PHillips, and the equation of one to the other seemed to be suggested, that we would feel that it should be open to the defendant to argue that the project of Phillips, which was a much broader and more comprehensive thing than anything that was visualized by the plaintff.

THE COURT: I don't believe that there is anything in my instructions which preempts that area from the jury. And I suppose that you can make that argument.

However, the thrust of the litigation now involves the misappropriation of a concept, and I suppose it is actionable, if you misappropriate somebody's concept, and then use it as a part of a greater and more glorious complex, and viewd most favorably to the plaintiff, that is probably what happened here, and I would think that would still be actionable.

The fact that Phillips' complex and the covenants made with the Puerto Rican government, were much more far reaching and the monetary commitment much more far reaching only goes to the value of the plaintiff's concept. It does not got to the actionability -- it does not go as to whether the tort was actionable or not. But I don't think there is anything I have said that prevents you from making that contention.

MR. MacCRATE: Very well.

MR. JEMISON: I would tend to agree with your Honor. I think it illustrates the fact of the numerous building blocks that went into this continuing project, and of course, as Mr. MacCrate visualizes this, it would permit him to argue that the overall economic impact on Phillips as a result of this project, has been a substantial monetary loss.

THE COURT: Of course he can argue that. I don't think that that has too much validity, but I'm not the jury.

Somewhere in the middle the Phillips Company made the independent business decision to build a fibers plant.

MR. MARKS: Judge, if they are going to argue that this fiber plant loss should be taken into account by the jury, I'm not aware that that was what they were going to argue, we certainly would object to that and take the position that this is a separate business decision and one that they can't consider at this point.

THE COURT: I don't think you have to object to that. When your turn comes, you can just simply tell them that it is obvious that that was a separate decision, they didn't have to build a fibers plant under their contract with Puerto Rico, nor did they have to commit so much money so soon. They chose to do that.

Obviously, although there is some testimony here that they didn't expect to make a profit on it, common sense will tell you that they probably thought it would be profitable. There is an issue of profitabliity in this case that nobody has ever touched on, and I'm reluctant to even inject it. I think we have enough problems.

But there is a factor here which is entirely separate from what we are talking about. Just so there will be no mystery, I will state it very briefly:

If a person has an overall complex business where he's catering to a trade and where he's trying to keep customers continuity, and where he's maintaining chains of retail outlets, sometimes it is important for him to increase his available materials for sale, even if it is a loss.

Sometimes it is important for him to be a wholly integrated oil company, so he can say, "Well, I also sell fibers, even if the fibers aren't profitable."

That is common merchandising. I don't think that that is a big issue. But I'm not going to tell counsel he can't make the argument simply because I don't think it has much validity.

That's for you to meet in your response.

I think number 8 and 9 are included, in substance, and I've already gone into some detail with you about what I intended to say with respect to those.

I've taken 10 in substance.

And I suppose 11.

And 12.

I think 13, also in substance, has been already included in what I said to you.

I did not plan to define secrecy. I don't think that has become an issue which requires -- my reference to secrecy has been taken from the re-statement, but certainly not in the words set forth in number 14.

As to number 15, I decline to charge that the idea must be novel. I think that I have already so stated.

It must, however, be original.

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17 has been charged in substance, by what I've already mentioned to you, and I think also 18.

I decline to charge 19 in the form presented, but I have gone over my discussion with you which also comes from the re-statement, in part.

I decline to charge 20.

21 has been expressed in substance.

I do not think that a claim for relief on the quasi-contract is the same as a claim for misappropriation. I think that we find in a quasi-contractual situation some slightly different elements.

I will come back to that in a moment, gentlemen.

MR. MacCRATE: We were relying there upon Judge Weinfeld's footnote in Krisell v. Duran, which is a misprint In the title of the case.

THE COURT: You see, I believe with all respect to Judge Weinfeld that you do have a quasi-contractual liability even if you had no originality. Perhaps you could have it even if the concept were not such as to be legally protected, although I would have to divorce my thinking from this case in order to make some kind of case where you could have. So I won't stick on that point.

But I think for the purposes of this case the originality is not essential to the quasi-contractual claim.

23 is charged in substance. Also 24.

No. 25 I have already explained what I had in mind with respect to a quasi-contract and I think this covers generally what is contained in 25.

I decline to charge No. 26.

MR. MacCRATE: Your Honor, 25 related to implied in fact contract.

THE COURT: Yes.

MR. MacCRATE: Rather than quasi-contract.

THE COURT: Yes, I understand that, but I think I went over with you my discussion of contract implied in fact and read it substantially verbatim to you.

MR. MacCRATE: You did but I misunderstood the reference to quasi-contract.

THE COURT: I am sorry, I probably misspoke.

I decline to charge 26 in the form presented although I believe I will distinguish between the theories.

I decline to charge 27 although I believe it is clear in my discussion that I have included the theory that it must be reduced to tangible form.

I have explained all of this to you practically verbatim before and after the interruption I can't remember how much I read but I believe I covered it all as to the balance of it and there is no necessity for making any specific ruling as to requests through and including 29 or the damages issue which I also mentioned to you before we recessed.

Now, there is a supplemental request here.

Where is that?

MR. MacCRATE: No, your Honor.

THE COURT: All right. I thought you said you were bringing in one.

MR. MacCRATE: That was with respect to special interrogatories.

THE COURT: If there is time I will talk tomo rrow morning to counsel about those but I don't think we need do it today unless you find anything else.

Is there any other problem that anyone wants to take up?

MR. MacCRATE: I don't believe so.

MR. MARKS: No.

THE COURT: All right. Off the record.

(Discussion off the record.)

(Adjourned to Friday, January 23, 1976, at 10.15 o'clock a.m.)

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PRUDENTIAL OIL CORPORATION

vs. 67 Civ. 3748

PHILLIPS PETROLEUM COMPANY.

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New York, January 23, 1976;
10.30 o'clock a.m.

(Trial resumed.)

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(Jury present.)

THE COURT: Mr. MacCrate, you may make a closing argument on behalf of the defendant.

MR. MacCRATE: Thank you, yobur Honor.

Ladies and gentlemen of the jury, this is a very important time for the parties to this dispute. The case will soon be submitted to you to decide. You have been a most attentive jury and I know I speak for all of us on both sides that we indeed appreciate it. We are grateful for the hearing that you have given to us.

On behalf of Phillips I shall attempt to bring the record together. There has been a lot of it and many things that you could not share in as we were leaing through papers and pointing things out to the witnesses, and you just had a vague idea at the time as to what we were about.

My task is to try and bring to you in some coherent way an understanding of all this that we have been putting into this record and is now before you for decision.

I want to explain the basis of Phillips' denial of any liability in this case either to the plaintiff or to those for whom the plaintiff may prosecute this action. The issues remaining now for your decision are not as broad as I covered in my opening statement. They have been reduced and all the issues that now remain relate to an alleged concept of Mr. Shippee, Mr. Willey and Mr. Young.

What was that concept? Can you identify it? Was it really theirs? Can it be distinguished from the ideas of others? Did it really have any originality? Was it ever reduced to a tangible understandable form? Was it ever put to a substantial use by Phillips? These are questions that I propose to address this morning.

There are helpful tools in the record which you may employ in reaching your decision. You can request to see the various exhibits and included as one exhibit marked in evidence, is a stipulation of facts that traces the history of the efforts to establish a petrochemical complex in Puerto Rico.

That stipulation of facts has identified in it 85 joint exhibits. These are exhibits that were stipulated to as authentic and they are explained or identified in this stipulation of facts.

Together the stipulated facts and the stipulated exhibits provide a backdrop against which to examine these alleged concepts of Shippee, Willey and Young.

There you will find in the stipulated record the accomplishments of the EDA of Puerto Rico and of the Commonwealth Government and you will find also the unique, unprecedented response of Phillips to the desire, to the seeking by EDA of someone to come in and produce petrochemicals in Puerto Rico. This is what it was all about.

I submit that in their brief fit of activity and at the end of 1962 and the beginning of 1963 what was produced by Messrs. Shippee, Willey and Young was devoid of any meaningful product.

2 a.m. jklt 1

Now, let me mention a further tool which is important in trying to understand some of the technical discussion in which the witnesses have been engaged.

We heard many strange words. We heard description of technical processings. But there is in a stipulated exhibit, Court's Exhibit 3, in paragraphs 19 and 20, a review of the difference between, in paragraph 19, the refining of crude oil, and on the other hand, in paragraph 20, a review of the various processes by which petrochemicals are manufactured. And this is the whole underlying distinction between what was being talked about by Shippee, Willey and Young, and what Phillips actually installed.

You will remember at the opening of this case I spoke of my wrist as the source of the crude feedstock, and my hand as the refinery with the fingers going out, and how off of one of those streams of naphtha the petrochemical production is established, and it is that second hand out there that is the Phillips Core plant that is operated today in Puerto Rico.

I believe that in the closing hours of the trial defendant's expert, Joe Moore, added significantly to our understanding of these distinctions, and I believe that his testimony is helpful in this regard. Because it is so

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fundamental to a comprehension of just what went on here and what people were talking about, I do take these few minutes to address it.

We each must understand the difference between a refinery and the manufacturing of petrochemicals, the process that follows. EDA was seeking petrochemical production in Puerto Rico, not another gasoline plant.

Now, the answer of Shippee, Willey and Young was, "Wait till next year, or the next year, or the next year after that for petrochemical production. But please give us support. Let us plan to build only a refinery now and help us get the oil quota," which is really all they ever cared about. They could never see beyond that to the actual significance of what it was that EDA was seeking, the petrochemical production.

Their thinking never got beyond some mythical, tradable quota worth astronomical sums, a far different object than the special restricted non-tradable allocation, loaded with obligations, that Phillips sought and received at the end of 1965.

Just what do Mr. Shippee and Mr. Willey and Mr. Young claim that they created? Their so-called concept changes like the weather whenever it is talked about.

Mr. Farrell follows me in his closing statement, and when he gets up to explain to you that concept, bear in mind what the reputed authors of that concept had to say in their testimony.

Now, if we go to Mr. Shippee's testimony in October, 1967 -- much closer to the event -- this was read to you yesterday; his description of the concept is in these words:

"The new concept was simply a recognition that you cannot get chemical companies to make commitments in order to have so-called back-to-back contracts to build a refinery, that you have to build a core plant refinery which will subsequently supply chemical feedstocks, and in the meantime, it has got to run. Even though it is a petrochemical refinery, until it has chemical customers, it is a gasoline refinery. We had to have agreement from EDA, since the last thing they needed was an additional gasoline refinery. They had to -- that until the satellites plants were in being, in effect, for the first few years, this would essentially be another gasoline refinery."

And Mr. Shippee's conclusion:

"And there was no other way to attack the problem."

Phillips found a way. Phillips built a petrochemical plant. It went in, and that's just what it built.

I emphasize that these are not the words of counsel in 1967. They are Mr. Shippee's own sworn testimony in 1967.

Since Messrs. Shippee, Willey and Young could find no one to whom to sell petrochemicals, their idea was essentially a very simple one: build a refinery and wait for the customers.

But this was exactly the route, as noted by Bruce Brown and by Joe Moore, in his testimony, that Commonwealth Oil had followed in the past. What in this had one jot of originality? And how could it possibly succeed in the face of the Oil Import Control Program? It was just more gasoline, more fuel coming to the east coast of the United States, so obviously there must be more to the concept.

And Mr. Shippee again testified about this concept here at the trial. Now this appears at page 202 and 203 of the transcript of the trial. You heard it way back two weeks ago or more:

"Q What was the new concept that you described to Mr. Diaz?

"A The new concept was that we should stop our focus on getting a firm commitment from a chemical company and return to the original focus" -- the original focus, he was simply returning to a focus of someone in the past -- "and return to the original focus of the core plant followed by satellites."

This is exactly what we had in the Commonwealth Oil situation.

Mr. Moore, who was intimately familiar with that, has told us about that. And then Mr. Shippee goes on:

"And then change the concept of the core so that it would be conceptible"(maybe that is acceptable) but "concepitble and workable to the Oil Import Board and in the degree of change or modification, the core plant should be very flexible so it starts out as an existing refinery."

Well, an existing refinery, as Mr. Moore explained to us, is very flexible. You haven't made any decisions down the line. You haven't put in the units. You haven't said, "I'm going to make this or this," and in that way limited yourself. You have great flexibility at this point before you build anything.

So continuing with Mr. Shippee's testimony:

"the core plant should be very flexible, so it starts out as an existing refinery and is able to change over to a petrochemical refinery once it is established and we can attract the chemical companies to come to Puerto Rico, but not to rely upon the good intentions of anybody. We should require that it have the character of a quasi-public utility, and that it be part of the agreement with the Oil Import Board and part of the agreement with the corporation that it has to supply a feedstock, if a chemical company comes to Puerto Rico and requires it, that the chemical companies establishing themselves in Puerto Rico would have the right of first refusal on anything that the refinery could make, even if the refinery had to make it and suffer a loss, and that the EDA would undertake to make good their loss because it was the purpose of the refinery to form the basis of a chemical industry."

At that point his Honor asked:

"This is all what the witness told Mr. Diaz-Hernandez?

"MR. FARRELL: Yes.

"A That is my concept that I described.

"MR. FARRELL: No, your Honor, that is what you described to Mr. Diaz?

"A Yes. That was our new concept, principally my thought and idea."

Now, you may recall Mr. Shippee's self-evaluation in his testimony, given in the suit in December, 1965, that he brought against Mohawk Airlines, in which he sought to recover for the same loss that he now asserts against Phillips.

He was there asked:

"Q I take it, Mr. Shippee, you were not the only person embarking on the venture?

"A I was the original motivator and chief negotiator and the originator."

But Mr. Willey and Mr. Young seem to have a somewhat different view and you also heard their testimony. Here is what Mr. Willey had to say on his direct examination, Mr. Farrell questioning him.

It begins with a statement by his Honor:

"And you say you are the first person to have used the expression quasi-public utility in connection with this core plant?

"THE WITNESS: Yes, sir.

"Q Now will you tell us what your idea was of a quasi-public utility as applied to this project?

"A Well, the concept was to get a core plant constructed, first get the import quota, then construct the core plant and then accept applications from anybody who wanted to put in some kind of chemical plant that could use these feedstocks, to cooperate with the Puerto Rican Government like a utility, like Con Ed would put in a light, they would put in any plants that could reasonably be fitted in and accepted regardless of profit involved and also the other limitations of a public utility is that you can't make a huge profit. You can make, you are not guaranteed any profit at all but you cannot make a huge one. That and the acceptability of almost anybody who would apply to guarantee there would be plenty of plants, of employment in Puerto Rico."

The direct interrogation of Mr. Willey went on and again on page 633:

"Q Did you hold meetings with Mr. Young and Mr. Shippee to discuss this matter during this period?

"A Oh, I would hardly say meetings. I think I was able to do the whole thing in a matter of minutes. It was just a concept."

Turning to Mr. Willey's cross-examination and we find at pages 666 and 667 of the transcript the following questions and answers:

"Q The idea of calling this concept a quasi-public utility was yours, was it not?

"A Yes.

"Q You gave that idea to Mr. Shippee, is that right?

"A Yes.

"Q You gave him that idea at what time?

"A I can't say but very early, perhaps the end of November of something like that. Some time in November I guess is best I can recall.

"Q 1962?

"A Of 1962.

"Q Was that an important concept to the program that you were proposing?

"A Certainly. It was the difference between the miserable failure that preceded it to this point where it suddenly turned.

"Q That is what made the difference?

"A No, sir, I wouldn't answer that question that way. Mr. Shippee mostly made the difference. He took this plan and ran with it when everything failed. I merely added this which helped, so it wasn't the difference.

"Q The two differences was the individual, Mr. Shippee, and this concept, is that right?

"THE COURT: This is in his opinion that you are asking him.

"A No, it wasn't only Mr. Shippee and this. It was a team, a whole group of people. It was

Mr. Anderson, Mr. Hernandez, Mr. Shippee. He brought the whole thing together. This is one of the things that helped turn it but this was a team effort. It wasn't something that a man did in one day."

A little later in cross-examination, at page 670, again Mr. Willey:

"Q Mr. Willey, did your concept of quasi-public utility include the idea if the refinery having to make a chemical would suffer a loss that EDA would undertake to make good on that loss?

"A I had no conversation with EDA about it so I don't know.

"Q Did your concept include that?

"A I just don't -- no, I don't think so.

"Q There was no idea of an investment guarantee in your concept?

"A No.

"Q You indicated that the petrochemical feedstock fed out from the plant would have to be made regardless of the profit involved, is that part of your idea?

"A I would say within some reason.

"Q Well, can you define that boundary of reason for us?

"A No, I can only say within some reason, more or less right of first refusal. They could refuse it under some circumstances. When I say quasi, I don't say public utility; semi-public utility. The public utility has to take an electric customer whether they lose money or not. This wouldn't necessarily be true. Maybe to some limited extent to employ people in Puerto Rico but not redesign a plant to take on a customer and lose money.

"Q Your example of Con Ed having to furnish electricity to someone was an inappropriate one?

"A No, it wasn't inappropriate, it was illustrative. I said the quasi, I didn't say public utility. I said quasi, semi-public utility and there is a clear distinction.

"Q The right of first refusal is possessed by whom, EDA, by Propco" which you will remember was the name of Prudential's proposed company -- "or by some prospective purchaser?

"A First of all, I think it was, it would be by the core plant. The core plant would have the -- if any plant was to come in Puerto Rico the owners o the core plant would have the right to first refusal on anything moving into Puerto Rico.

"Q Your notion was that no new business could locate in Puerto Rico unless that business agreed to buy from Propco?

"A I didn't say that.

"Q What was your idea?

"A I used the words right of first refusal. They ought to try to get into this core plant because this was going to be, this core plant has reasonable flexible feedstocks whereas the other plant, the two plants that were there already were making all the gasoline they could.

"This was a completely different concept, to make feedstocks and they should come to -- if someone was coming in with a newer product to the chemical plant, not business -- you used the word business, too broad. Talking only about presented to a chemical plant, they should come to this company and see if they could make it.

"If they had someone in mind they ought to come here first because this is the reason these people were going to build this core plant, to get all the business they could within reason.

"Q Who would tell a business that was proposing to locate in Puerto Rico that it had to go first to Propco?

"A I would say the EDA, the Puerto Ricans.

2 "Q So what you were asking was for EDA to make a declaration that any chemical company that wanted to produce anything within Puerto Rico had to first come to this proposed company?

"A I don't know at that time how far this went."

Well, if Mr. Willey didn't know, he was the inventor he says of the concept, who did know? One gets the distinct impression from the reputed office that this concept in January 1976 is still being developed.

Mr. Young, just as Mr. Shippee and Mr. Willey, claimed credit as author. Reading from his direct examination on page 824 and following of the transcript:

"Q Now, Mr. Young, did there come a time when you proposed changes to the project, as it had been explained to you up to that time?

"A Yes.

"Q And what were those changes?

"THE COURT: First, when did he propose them and to whom, if you will?

"MR. FARRELL: All right.

"Q When did you propose them and to whom?

"A I proposed them in a redrafting of the report, and there is was a different approach to the report. Instead of being the approach that had been taken in the past, it was an approach of a true petrochemical feedstock plant, dedicated to preparing feedstocks to the satellite plants that would be developed around the refinery, which was a necessary first step to produce these feedstocks.

"Q What were your proposals, Mr- Young?

"A The proposals in there were to bring in basic chemicals, sulfur, particularly, from crude -- most crudes contain sulfur, and one of the approaches was to remove sulfur from the crude stream. Another approach was to build a tetraethyl lead plant, lead alkyl additive plant, because Puerto Rico was then importing several million pounds a year of lead anti-knock fluid for the gasolines that were being made in Puerto Rico.

"There was also a submission to the EDA that I put in the report which said we would use what we called a quasi-public utility or first refusal type approach so that if any satellite chemical company wished to locate near this core refinery, the core plant would be dedicated to give that satellite the first refusal of the product. That product would not be sold elsewhere."

Note, to Mr. Willey the first refusal was with the core plant. To Mr. Young, the first refusal was to the chemical company coming in.

Now, it is fascinating to note that how these originators differ in their concept that you are being asked to place great value upon.

Whoever was right, Mr. Young was emphatic that he did the actual writing of the report. And on the report prepared by Mr. Coan back in April or thereabouts of 1962, which is P-213, we have there identied handwriting of Mr. Young. In other words, Mr. Young was putting together a report and he started with what Mr. Coan had provided him in the fall of 1962.

Reading at page 828 of the transcript Mr. Young said:

"This is what I did, and that is the approach that I took.

"Q What was the approach that you took?

"A That it was not necessary to have a prior agreement with a chemical company in order to make this a viable contract, viable oil import request."

Their vision saw no farther. Thus, you can see we come full circle as we go from Shippee to Willey to Young. And the one thing that the three originators appear to have in common, is that they agree that they couldn't find any chemical companies who would become captive customers of a petrochemical plant.

Their solution, build a gasoline refinery and dress up the presentation with statements of good intention.

And then, when asked to interpret this, the authors themselves appear to have some difficulty of comprehension. Is it surprising in these circumstances, that the witnesses at the trial experienced some measure of difficulty?

Sometimes the failure to ask a witness a question may be most revealing of all.

Now, you will recall that an expert on oil and petrochemicals, one who identified himself intimately with Puerto Rico, thathe knew what had gone on in Puerto Rico, he had familiarity, intimate familiarity with the Phillips plant, he had done some work with respect to it, for the Commonwealth government, he was on the witness stand, put there by the plaintiffs -- this is Mr. Walker.

Now, why wasn't Mr. Walker asked if he understood what any of these concepts meant? Is it possible that an independent professional with many years experience

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in analyzing petrochemical projects, would have had to testify that he didn't know what it meant, or that the concepts were so vague that they could mean almost anything, so that any petroleum refinery or petrochemical plant, if looked at long enough, could be said to incorporate some features of flexibility of some kind or another?

Now, why did plaintiff call a witness to place a value on its concepts; a man like Mr. Rosenthal, who acknowledged he had no experience or expertise in the petrochemical business? That appears at 1136 and 1137 of the transcript.

They put Mr. Walker on the stand. They didn't ask him to evaluate the concepts. They knew the kind of response they would get.

Now, in mentioning Mr. Rosenthal, you will also recall that he acknowledged that the financing of every project was unique and that the value of a business idea could not be determined in the abstract. But he then decided that even though this was true, and that he knew nothing about the petrochemical business, he would place a value of $14,000,000 on plaintiff's concept. And I refer to 1149 and 1151 in the transcript.

We have not been reluctant to ask experts in the petrochemical field what they understood the concepts to mean to them. At least they grappled with it, and they tried to read into it some sense and meaning, to help us to understand just waht it is for which Mr.Shippee, Mr. Willey and Mr. Young are making such extravagant claims.

Now, Mr. Moore explained what every one of plaintiff's statements of concept meant to him, or what he thought they could reasonably mean in the petrochemical business. But he also testified -- now, his testimony in that regard is at 1868-75 of the transcript -- but he also testified thatin his opinion those ideas had not connection, no connection whatsoever to the Phillips Core project. They were not embodied in it and had no relevance to it.

He pointed out that Core is not a gasoline refinery, which is what plaintiff wanted to build. This appears in Mr. Moore's testimony at 1864-66. And Mr. Moore was not asked one question on cross examination about that part of his testimony. We may speculate as to why he was asked no such question.

But he did go on, and he testified that the Core facility, what Phillips actually built in Mayaguez -- oh, no, not Mayaguez, in Guayama, it was Mr. Shippee who put the plant up in the northwest corner, Phillips put it down on the south coast -- but Mr. Moore went on to testify that the Core facility built by Phillips in the

Guayama area was similar in concept to the Sweeney facility in Texas, which Phillips built fifteen or twenty years before Core, just after World War II.

You will recall that Mr. Waldby was the man who ran the Sweeney plant, a man not gifted in writing in our representations, but someone who knew how to construct a plant, knew how to extablish those units that would produce those products that could be sold -- a meaningful, substantial contribution to making a project work.

Now, this Sweeney plant is what Mr. Waldby ran before he started to work ultimately full time with respect to the Puerto Rican project.

Now, Mr. Moore's testimony in this was never questioned. And Mr. Moore also explained to you why Phillips did not need prior contract commitments from chemical companies in order to finance Core. This Mr. Bruce Brown had told us is why a whole year earlier, before Mr. Shippee, Mr. Willey and Mr. Young were floundering around, Bruce Brown was trying to enlist Phillips as a participant in a program, because they knew, with a worldwide marketing organization for petrochemicals, how you could dispose of the petrochemicals until the satellites could be developed in Puerto Rico. This was fundamental.

What was it that Mr. Shippee was banking at the at the door of Mr. Fischbeck for in March of 1963? He needed a marketing study. He needed to have some explanation of what you could do with the product.

So all he was ever able to talk about was a basic refinery, a gasoline refinery -- surely flexible. No one can deny that flexibility, as I pointed out.

But there was no possibility within this concept of getting approval from the oil import authorities. It was all pie in the sky, by and by.

Now, Mr. Moore's testimony goes on to explain why Phillips did not need to build a quasi-public utility and ask the Puerto Rican government to pick up its losses before it could build Core.

We have heard of some problems that Phillips has had, but it was not asking EDA to guarantee any loss or anything of that character.

Phillips put up its own money and placed that money at risk along with millions of dollars, and when there were losses, Phillips didn't ask the Puerto Rican government to pick them up.

One thing is clear in all this discussion of concepts, that Shippee, Willey and Young, can claim nothing, and can ask you, the members of the jury, to award them nothing for the ideas and efforts of others, and the list

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of "others" who contributed to all of this thinking that goes back well into the 1950s is an impressive list. And the state of the knowledge, of the gathering of ideas that had been developed as we arrive in '61, 1961 and 1962, is a part of the background against which to measure whether there is really any originality, whether there is any new thought brought here of whatever kind.

The Core facilities were the special interest of Teodoro Moscoso. Speakingof the Commonwealth Oil Refining Company in 1959 and Puerto Rico's aspirations for its development, these were Mr. Moscoso's words that appear in an exhibit in evidence, D-9:

"The refinery is the core of this existing and growing complex. The refinery will be the raw material base for the basic chemical industry now under construction by Union Carbide. This basic chemical industry will in turn be the basis for the manufacture of a host of finished products. The importance of this refinery to the welfare of Puerto Rico was given concrete recognition last year by the Commonwealth of Puerto Rico, when two government authorities loaned the company a total of three and a quarter million dollars to avoid insolvency. I hope that it will be proof positive for a similar complex to be developed with a refinery on the north coast as its core."

Now, Commonwealth Oil certainly was having problems. It was having very serious problems, and there was also, soon after this statement, the imposition of the mandatory oil import regulations, and we heard Mr. Van Hyning explain how difficult this made it for Puerto Rico and how he and Mr. Moscoso and then Mr. Durand kept in constant communication with the Interior Department people who had the responsibility for administering that program, to get for Puerto Rico the necessary consideration that would provide the feedstocks for petrochemical plants and then the production of those petrochemical plants, to provide the raw materials for employment in Puerto Rico.

This was all against a background of very thoughtful study with EDA. They are in evidence in the record here as D-8, D-24 and a site study, the Ti Liang Study of December, 1960, just three examples of the kind of study that all was done prior to the time that Mr. Shippee, Mr. Willey and Mr. Young came near Puerto Rico, done back in the 1950s, in the early '60s. I should say 1960 and '61.

Arthur D. Little -- you will remember yesterday we had a witness by the name of Norton, who testified by deposition, who was in charge of their international operations -- well, Arthur D. Little had a long relation with the Puerto Rican government. It went back into the early 1950s,

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and one of their early studies, as is pointed out in D-8, dealt with core industries for Puerto Rico, and the research department of EDA in 1957, in talking about what Arthur D. Little had recommended some years before -- and you will remember that Mr. Van Hyning identified this presentation by economic division as something with which he had been involved -- but that report says, in all major respects the plan for core industries made seven years ago is still in operation today.

And Mr. Barton, the head of the economic division, in that presentation, went on to explain the reasons for the consideration attention to refineries and petrochemicals in 1957. This is prior to the import program. They provide the basis for an integrated kind of industrial development which we have not yet experienced. Note that petrochemicals can branch out either into synthetic fibers or into plastics.

He spoke further of the potential of this industry for Puerto Rico and the probability of its development and proliferation into a basic industrial complex.

This was Puerto Rican thinking. This was native Puerto Rican thought that was developing this program.

Now compare, if you will, the Shippee-Willey-Young quasi-utility theory with Mr. Barton's concept of what private industry had to provide. He knew of the disaster with Commonwealth Oil and how they had had to come to the rescure and he says, still in this report, "Financial assistance is not a significant factor in the promotion of the petroleum and petrochemical industries. Government investment will necessarily be small in the future as well. And the increase in heavy industry will probably have to be financed by industrial and institutional investors, mostly from the mainland."

Now we turn to the stipulation of facts . We can follow what EDA, What the Administration is doing:

"As of March 1961, when Rafael Durand succeeded Teodoro Moscoso as administrator of EDA, there were two existing oil refineries in Puerto Rico which had been constructed during the early 1950s as a part of Operation Bootstrap. During the first half of 1961 the officials of EDA prepared to encourage the location in Puerto Rico of a refining and petrochmical facility and thus encourage the expansion of the petrochemical industry of Puerto Rico."

The problems of Commonwealth Oil were behind at that time. EDA was prepared to go full speed to get such a program.

The stipulated facts:

"Such program was conceived as part of Operation

Bootstrap to compensate for the lack of indigenous raw materials in Puerto Rico necessary to support industrial growth. Products of such a facility were looked upon as intermediate products which ultimately would be used to produce a large part of consumer products, thus forming the basis of new diverse industries and resulting in substantially increased employment in Puerto Rico."

The stipulation goes on to say that EDA in June 1961 and thereafter "undertook a program of actively encouraging potential sponsors of a third refinery to build such a project in Puerto Rico."

The stipulation further identifies eight major companies that were affirmatively solicited by EDA, seeking them to come in and establish this kind of petrochemical production in Puerto Rico.

Now, the story that follows is that only Phillips was prepared to assume the commitments that EDA felt were necessary to achieve those objectives.

Now, this isn't something that was difficult to find. This isn't something that required all sorts of special insight to explain to PHillips. EDA was out pounding the pavement, looking for companies to do this. This isn't the passing of a presentation concept from one to another. EDA would be delighted to call on anyone who evinced an interest. And of course, in due time, that is what happened.

But let's go back to the development of this within EDA, because this is central, when we look at just whose ideas and whose efforst are really reflected here.

Mr. Durand replaced Mr. Moscoso in March of 1961 and there were repeated visits with the United States Department of Interior authorities, and they were describing what their concept was, and the only way any project had any chance of success was if EDA said, "We want you," and if EDA was going to say that, it had to be someone who was responsive to what EDA was asking for.

These were not concepts out there. These were concepts within EDA.

This December 1961 report on the chemical and allied products industry in Puerto Rico that was published by EDA came right in the middle of this thrust to reach out to find those who would sponsor such programs. The site study is P-211. And that was distributed in quantity to anyone who might have an interest in seeing where around the island might be appropriate sites. You have to have harbor facilities to bring in the tankers and things of that sort, so that you can see immediately that there is very special concerns when locating a plant of this sort.

But in the same month that this report was published, Mr. Durand, with Mr. Van Hyning, had a meeting at the San Juan Airport, of which we have heard testimony, with the Secretary of the Interior, Stewart Udall and following that meeting, Mr. Durand wrote to Mr. Udall, attempting to enlist Mr. Udall's support for whatthey were calling the "third refinery" with this petrochemical production.

They were viewing it as starting with the refining and proceeding right through the petrochemical facilities.

And in this letter Mr. Durand said that the hopes of several years ago for petrochemical production had been discouraged, dampened by the Oil Import Program.

"Mr. Secretary, please consider our plight and help us."

Now, it was at that time, the following week, in fact, that Jack Coan enters the story. Jack Coan is the man who right through this whole thing has had a continuity of contribution, who was actually helping various people successively, and explaining to them what EDA was talking about. Jack Coan in many respects was the EDA intermediary here. He was trying to promote something, and had become thoroughly familiar with EDA attitudes.

So when he came in and proposed to the EDA officials in December of 1961 that they support a proposal for a third refinery that was going to provide petrochemical production in Puerto Rico, Mr. Durand gave to Mr. Coan a letter of support. That is a stipulated exhibit. It is referred to in the stipulation of facts. It is J-19, December 12, 1961.

I emphasize that letter of support. You find in it that Mr. Chapman also received such a letter of support. Well, look in vain for any letter of support that ever went to Prudential Oil or Mr. Shippee or Mr. Willey or Mr. Young. They never could get off the ground.

There was an explanation offered that Mr. Anderson and Mr. Udall, was it, had agreed to this but we didn't hear that from Mr. Anderson when he was on the witness stand. There was no inquiry as to that.

But let us go back to March of 1962 and Mr. Durand made clear in a letter to Texaco -- he is addressing a major oil company -- we are interested in your coming and developing a petrochemical project here. But what does he say? That our support for a third refinery would depend on petrochemical production. That was in the transcript at 1997 and it is March 22, 1962 to which Mr. Durand's testimony was referring about a letter that he wrote to Texaco in March of 1962.

What Mr. Shippee and Mr. Willey and Mr. Young collided with was that basic EDA policy. A year later, in March of 1963 we have a meeting, conversations between Mr. Shippee and Arthur D. Little, the long time consultants to EDA and actually it was as early as the January meeting which is recorded in D-125 of January 10, 1963, that EDA asked for approval of a third refinery project was that the facility must be petrochemically oriented, not in the future but when it was built. And that it must be and, this is significant, a sound business venture.

Now, the Prudential proposal was understood at that time, and this is the contemporaneous time by Arthur D. Little and Mr. Norton, and I am quoting from D-125:

"The refinery would expect to be subsidized by Puerto Rico to the extent of a utility type return."

That seems to have been the contemporaneous definition of this quasi utility.

And then Mr. Norton noted another covenant, it was to have exclusivity to be offered first crack to any project on the Island brought to the Government.

I forget which side Mr. Willey was on and Mr. Young was one as to who had the right of first refusal but I think this is Mr. Willey's concept rather than Mr. Young's.

Then the Arthur D. Little memorandum goes on:

"The refinery does not intend to make chemicals itself. Nor does it intend to market products."

There it was, no marketing capability, no marketing planning, please, Mr. Fischbeck, do a marketing study, tell us what we can do so we can in some way present a proposal that would have any chance of EDA support.

Let us trace the story of Jack Coan. The facts are stipulated as to this. We find Jack Coan after the Gibbs, what we call the Gibbs-PPI proposal fell apart, continuing to work with Oscar Chapman. Here is another significant person, highly significant. This is the man who prosecuted the application before the Oil Import Administration later on, who was working already in December 1961 with Mr. Coan. What were his concepts? What were his efforts?

All of this going on, Mr. Coan back into the fall of 1961 as the stipulation explained, Mr. Chapman brought in in December of 1961. Then, of course, we have Mr. Bruce Brown.

You met Mr. Bruce Brown who testified here. In view of how ancient these events are, many of the people that we saw on the witness stand have grown old in the meantime. This back in 1962 was 14 years ago that Mr. Brown was working with Mr. Coan and Mr. Chapman and trying to put together a project that would establish this petrochemical production in Puerto Rico that EDA was seeking.

Mr. Farrell yesterday started reading an interrogatory, an answer made by Mr. Chapman which was descriptive of what Mr. Chapman did. That was only part of the story. Mr. Farrell's reading yesterday that you might have thought was interminable, was just a description of the things Mr. Chapman had done.

And it went on and on and on and it is not alone Mr. Chapman but his firm. This was his entire law firm involved in working on these matters. This was the description that took so long to get into the record but there is a prior story with Mr. Chapman.

Mr. Chapman is investigating what the attitude is of the Oil Import Administration, right from December 1961 on. And he is investigating how the regulations might be adapted at the same time to be consonant with the policy of the United States Government regarding the restriction of unlimited foreign oil coming into the United States and, at the same time, meet what EDA was asking for. So we have EDA with Mr. Coan and Mr. Chapman working through this period, trying to establish a way of doing it.

This is what Mr. Coan put together, P-213, in April of 1962. There are some pages missing from it. Why? Well, when Mr. Shippee wanted to put something together, he and Mr. Young and Mr. Willey, they found the easiest way to provide any technical information regarding a possible refinery was just to lift bodily out of Mr.

Coan's report all of the technical refinery information.

Now, what eas that? That was a UOP study, Universal Oil Products. We keep hearing about UOP, one of the leading refinery design organizations in the country. In the record is Mr. Coan's paid invoice, he paid UOP for that study and that technical study is what you ultimately find in this book that we heard so much about from plaintiff.

If there are any of you who like Chinese puzzles, I suggest you take the stipulated UOP report of April of 1962 and see what Mr. Young apparently -- he says he put this all together -- did with that UOP report. They still refer to it as the UOP report but they will take one page and take the first paragraph on that page and then they take out two paragraphs and then they take the third paragraph and maybe the fourth and then they just take bodily two pages and go on and on and some of the tables don't fit in to what they want to talk about they feel, so they take out those pages.

You leaf through this UOP study and the end result I am sure would have amazed UOP.

2

Mr. Coan arranged for Prudential to get copies, extra copies of the UOP study so they could put it into a copy of the booklet that Prudential put together.

What of course was provided, I assume must have been what Mr. Coan had gotten. But what ends up after the paste job and discard of pages upon pages is actually pieces of the introduction and then the final addendum of the 1962 UOP report.

Interestingly, there was a Chapter 6 in the UOP report. Mr. Young discarded that. That was the petrochemical complex. That was a way to develop petrochemicals but that was all by and by as far as what Mr. Shippee and Mr. Willey and Mr. Young referred to as their concept.

If you want to examine the difference in substance between this type of presentation that was put together in the end of 1962 by Shippee and Willey and Young with something that shows knowledge of an industry, knowledge of an import quota program and the realities of what makes things work, done by a man who had spent his life in the oil and petrochemical industry, who had regulated the industry during the Korean War -- he was the man for the United States Government responsible for the regulation of the oil industry in the United States, Bruce Brown.

And there is a stipulated exhibit, J-21 of December 21, 1961, and in that memorandum that Mr. Brown prepared for Mr. Chapman, there is a knowledgeable analysis

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of just what it was that would have to be provided were there to be any EDA support or any possibility of Interior Department approval.

Now, you may recall that Mr. Brown on his cross-examination referred not only to getting a chemical company, he referred to getting a petrochemical facility. But he understands the realities of the business and just as if you had a corner store, you have to have customers. You can't put in a petrochemical facility unless you can sell what comes out of it. And he recognized that a company in the position of Phillips had the potential, could do this if it established petrochemical production, it could market them and when I held up for Mr. Brown the charts which, incidentally I hope to get out at this point to point out to you, it was only a day or two that you got tired of looking at the chart so we don't have to get it out again -- but when I held up the chart that was presented to the Import Administration by Phillips in 1964, in which Mr. Waldby identified as what went in the core facility, Mr. Brown said, yes, that was the kind of facility that I was recommending in 1961.

This is a Brown concept, if you will, if you are going to talk about credit, if you are going to talk about credit, if you are going to talk about effort, it all goes back and we find this lineage being carried down.

The bearers of the torch so to speak were Jack Coan and Oscar Chapman and they are the ones who when Mr. Brown dropped out of the effort, becoming chief executive officer of Murphy Oil Corporation and not feeling that he had the time to devote to trying to put a project like this together, having been told by Phillips they were not interested at that time, it was Mr. Coan and Mr. Chapman that continued their efforts during the summer of 1962.

This is again all in the stipulation. You can trace this history and see the continuing effort and the carrying forward of the information that had been developed. You have the studies from UOP that Mr. Coan had obtained. You had Mr. Coan's personal investment in those studies that are there carried on.

Now, we come to another sequence when some of the financial houses are approached by Mr. Coan. We haven't felt it necessary, either side, to go into detail as to what Warburg & Company or Kuhn Loeb did after April of 1962. But it was recognized if you are going to have a meaningful facility, going to have something that would actually be built and not just a few nice phrases on a piece of paper, that you had to have it financed.

And Mr. Coan therefore went and spoke with Warburg and it is through that chain of events that in the fall, as you have heard, Mr. Shippee, Mr. Willey and Mr. Young came into the picture because they were looking for various people who might be willing to sponsor a project. A Warburg partner knew Shippee or came to know him and he was brought in.

The period of November 1962 and December of 1962 seems to have been one of considerable activity. We have to rely for an accounting of this primarily on the testimony of Mr. Shippee, Mr. Willey and Mr. Young. We are told that they were employed full time on this but then when Mr. Shippee was asked about where he spent his time, we found that he had another company, there was a reference to a number of letterheads that his secretary had in his desk -- many -- and one had the impression there were a lot of irons in the fire and there was a drilling fund which was basically the business of Prudential, selling interest in oil drilling funds.

But during this period it is suggested that this whole brochure was put together. If we take the draft which is the blue volume, P-214, you find Mr. Shippee saying that by the end of December or early January, this was all completed except for, you remember, you poor people were sitting here while I was leafing pages with him there and you couldn't see what I was pointing to.

If you request you will have an opportunity to look at these pages and we identified some seven places in this notebook where there were changes made after January of 1963.

All of this effort that we are told about, all of the time that was devoted to it results in six little notations in this book.

Of course, it was just an incredible story I submit with respect to this book. It was suggested by Mr. Shippee in his testimony that some time, that he placed either in February or March, he took this book with him to Phillips' office in New York and he gave this booklet to them and they proceeded to type, retype, correct this, put it all in form -- not in a day or two, not over a weekend, but from that time in February or March 1963 to the end of May, Phillips according to Mr. Shippee, was working on this booklet, typing it I guess.

3 The end result of that was that about the day before he wanted to send it to Chapman, he got it back in piles and it had to be collated and that is what he sent down to Mr. Chapman on the 29th of May.

Now, recall that Mr. Holland was called by

Phillips. Mr. Holland was the office manager in the Phillips' office in lower Broadway. He said, yes, I remember what happened. Along at the time that he fixed in June of 1963, he had been called in to Mr. Fischbeck's office and asked to do a reproduction job. Typing? No, make Xerox copies and asked as office manager to arrange for making copies.

Mr. Holland was able to explain just how he fixed the time, that it was over a weekend, overtime for weekend work, for someone to come in and reproduce. A favor to Mr. Shippee, but the notion that a period of three months that this was in Phillips' office with people doing all sorts of things with it, is the furthest thing in the world from what Mr. Holland tells us happened.

It is apparent, I submit, that Mr. Fischbeck had a pleasant personal relationship with Mr. Shippee, there is no doubt about that. He did Mr. Shippee a favor. Why Mr. Shippee wanted 50 copies, 25 copies -- he only wanted 25 back so he left 25 with Phillips he said. Then at another point he said that he sent a copy to Mr. Fischbeck of this report.

We have, therefore, Mr. Shippee's statement of from 1 to 26 copies of the Prudential report apparently left in the New York office of Phillips.

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Now, just what notion of secrecy, confidentiality is involved in this multiplying of copies, where were they all being sent? What was this all about? Why in June of 1963 was Mr. Shippee looking for so many copies of this brochure? Was this some sort of a game to involve Phillips, to bring it in and ask for copies to be reproduced?

There was apparently some germ of reality in the testimony but I submit the idea that a handwritten draft would be transcribed in the Phillips offices and the papers held there for a period of several months, and then all of a sudden sent back the end of May just beggars belief.

This brochure requires a little more attention because this has been so central, I mean, this is the thing that is carried forward. And you know where some of its language ended up. And we will come to that.

But the kind of paper that was put together there, the suggestion that this was a significant contribution of information to anyone, just will not wash. Again, Mr. Norton of Arthur D. Little, in a contemporaneous memorandum of March, 1963, Exhibit D-128, notes the clear dissatisfaction of EDA with Prudential and what it is producing. EDA is becoming disenchanted with Prudential, and the brochure is disparaged as non-professional.

jklt 2

Both Mr. Irizarry and Mr. Diaz-Hernandez -- Mr. Irizarry, an assistant here to Mr. Diaz-Hernandez in the New York office of EDA -- were reported to have better prospective companies to deal with than Prudential.

Now, I don't think it is surprising that Mr. Norton had the impression that what Prudential wanted was a perfunctory evaluation of any economics or marketing potential of their product, and at 1954 of the transcript that is contrasted with what EDA was after, a serious in-depth evaluation of any study.

This difference between the perfunctory review, just the sort of blessing that Mr. Shippee and Mr. Willey and Mr. Young were seeking, and a study in-depth, which according to Mr. Norton of the Arthur D. Little firm, long time consultant of EDA, wanted, was all the difference in the world. This is the way EDA looked at things. They were for real. They wanted to establish petrochemical production.

I return just briefly to the question of what happened to the 25 sets of the 33-page presentation.

Interrogatory number 27, propounded to Prudential:

"(a) How many of the 25 sets of the 33-page presentation of Puerto Rico Oil and Petrochemical Company" --

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you will remember that is what we heard called PROPCO-- "were distributed by Prudential Connecticut and to whom?"

"A Unknown.

"(b) How many of the 25 sets of are still existent and in whose custody are they at this time?

"A Unknown."

While we are on this subject, so that you have Mr. Shippee's testimony in mind, Mr. Shippee expressly identified Mr. Holland of Phillips Petroleum.

"He was in charge of these corporate services, and he then told me he had made fifty and how many did I want, and I said, 'Send me 25 and hold 25,' and he sent me 25, including he returned the original book from which he had made it."

This is the draft with all of the handwriting on it. That is at page 284 of the transcript.

Then he went on:

"We collated them, put in the looseleaf. We then distributed them. We sent three of them to Washington, to Mr. Oscar Chapman. We gave one to Mr. Young, one to Mr. Anderson, one to Mr. Little, one to Mr. Wright, one to Mr. Willey. We gave one to Warburg and one to Kuhn Loeb.

"Q I"--

And the witness continued:

"We gave one to Mr. Fischbeck."

Still on the subject of this brochure, let's go to Mr. Diaz-Hernandez and his testimony at 925 of the transcript.

"Q Now, can you tell me the content of those discussions?

"A In December, when I saw the draft of that presentation, I told Mr. Shippee that the idea was good but that it had two weaknesses:

"The first one was the marketing, that nothing was said about the capabilities to market these petrochemical products."

This is back in December; all the flap about seeking marketing studies, that Mr. Fischbeck was going to get marketing studies in March, is three months later.

"The other weakness was that still at this stage they were using a lot of the technological data belonging to the previous project, to the UOP report."

And it never got beyond that point.

Anything of substance was lacking. No marketing, using an engineering study that simply described what Mr. Coan and Mr. Chapman and Mr. Brown had for a presentation they year before.

Now, Mr. Coan seems to have been the principal architect of the brochure. Mr. Brown told us that neither he nor Mr. Chapman were very happy with what was put together. But be that as it may, whatever were the deficiencies of the Coan report, they are carried forward into 1963 by Mr. Shippee, and there is just nothing of substance added.

Now, when we come to the period in June of 1962, and we approach the July period where we have had different accounts of what went on, and a curious moving of dates, you will remember that everyone was telling us about a July 2, 1963 meeting, and then lo and behold, a meeting that was supposed to have occurred on July 2nd had to be moved.

The story was, this meeting was held, then on the day following Mr. Shippee was in an air crash. And then all the events were related to having happened, first the meeting, then the air crash, and then succeeding events.

Well, when it was brought out on Mr. Shippee's cross examination that the air crash had occurred on July 2nd and that therefore the meeting must have taken place in an earlier time, there was a scurrying to find an earlier time. But we never really had a new date established for that meeting -- whether it was before or whether it was after the airplane crash.

And you will recall how Mr. Shippee had himself

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back in doing all sorts of things, active participant, as you go on through the summer of 1963. But then all of a sudden he's confronted with what he said back in December of 1965 in the action against Mohawk:

"I wasn't capable of handling the negotiations or continuing to pursue it. I lost all ability to concentrate and initiate and carry on the project which demanded a lot of time and attention and creative thought."

And he was asked about his work:

"All of my work was to take and develop situations into operations, and I took a situation in Puerto Rico, to develop a chemical industry for the Commonwealth, and I negotiated with the Governor, and I had a franchise to do this, and I negotiated with Oscar Chapman, former Secretary."

"Q When was that?

"A 1962. And I negotiated with Oscar Chapman, former Secretary of the Interior, and with Robert Anderson, former Secretary of the Treasury, and with Stanley Learned, president of the Phillips Petroleum Company, and I received from Phillipe Petroleum Company a contract to supply crude oil and buy the chemicals and to supply the technical and operating personnel for a $60,000,000 refinery in Puerto Rico, and this contract was dated November, 1962. And we were actively organizing the chemical complex in Puerto Rico

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in July of 1963, when the accident took place.

"I was not able to continue with it and the project has gone ahead without me.

"Q Will you tell me, Mr. Shippee, how you feel or estimate the accident caused you to lose this money or any part of it?

"A I wasn't capable of handling the negotiations or continuing to pursue it. I lost all ability to concentrate and initiate and carry on the project which demanded a lot of time and attention and creative thought.

"Q I take it, Mr. Shippee, you were not the only person embarking on this venture?

"A I was the only motivator, chief negotiator, and the originator. I was the chairman of the business and controlling stockholder.

"Q Did the negotiations finish, and you say consummate, into the finished product?

"A The negotiations which I was controlling grounded to a hlat and the other interested parties, essentially the Commonwealth of Puerto Rico, in my absence, turned in other directions and completed without me."

That was Mr. Shippee's version of how the torch was passed to Phillips in the summer of 1963 as he gave his sworn testimony in December of 1965.

Now, it is an interesting thing, this sworn testimony was sworn to, actually he had a chance to read over that transcript, to review it, and then he took an oath, put his signature on it, on February the 18th, 1966. This is just at the time that you have all sorts of noises being made about claims against Phillips. We have these "concepts" being held up -- supposedly the whole basis for what had happened.

But he was asking Mohawk Airlines to make him whole at that time. Nonetheless, with the other hand, he turned to Phillips.

We have talked about the ideas and efforts of Coan, of Chapman and of Brown and most importantly, of EDA.

Phillips came into this in August of 1963. We have had described the telephone conversation between Stanley Learned and Oscar Chapman. Here is Oscar Chapman, who has been working with this since December of 1961, and Mr. Chpaman says to Mr. Learned, "I believe, based on all of my exploration of this possibility, that if you can establish a petrochemical plant in Puerto Rico, that will produce less than fifty percent gasoline -- in other words, if you can maintain a high ratio of petrochemical production, that it is possible to get an oil import quota for that and establish such a source of raw materials in Puerto Rico."

And Mr. Learned's response is:

"I would not have been interested had you called me much sooner, but we have found Algerian oil. I have studies going on with respect to what we are going to do with that expected new production in Algeria, and let's investigate this."

And then you know how Mr. Conn goes down to Washington, has a meeting with Mr. Chapman, Mr. Chapman explains some of the background, and again we find, I don't know which of the 25 or more copies that were floating around it was, but a copy of that material, apparently with some other material, the Ti Liang site study which seems to be a part of what Mr. Chapman provided to Mr. Conn, and which Mr. Waldby received a day or so later in New York, was also included in that material, and Mr. Conn comes back and puts Mr. Waldby and Mr. Fischbeck, he thought, to work.

Well, Mr. Waldby in his testimony added an interesting human insight. Mr. Fischbeck had been looking at these things back in 1962, when Jack Coan came into the New York office of Phillips, and he had been looking at these things when Mr. Shippee and Mr. Willey and Mr. Young came into the New York office in the spring of 1963, and as Mr. Waldby records his conversation, after leaving the room with Mr. Conn, Fischbeck said, "You're kicking a dead horse and I'm going to be away anyway." He had enough.

And the testimony is that Mr. Fischbeck, in fact, after a brief discussion in August, that Mr. Waldby placed on the following Monday, around the 12th of August, had nothing further to do with the development of the Phillips project. But the Phillips project started from scratch, where a substantial oil and petrochemical program starts, right back at the drawing board, where you go to the technical data.

And we have in evidence the assignment sheet, when the technicians are given the assignment, and then we have in evidence a list of the nine departments and of the forty-six individuals who worked on this matter in the succeeding six weeks, as a program was built up, first an analysis of a 300,000 barrel a day refinery in Algeria, and then cutting that in half, when the economic feasibility was analyzed and they realized what a horrendous thing it would be to try and dispose of the quantity of petrochemicals that would be coming out of that, and they cut it in half, and what was put together was a proposal that is in P-217, this little brown brochure, called the PEA Project, Puerto Rico, Europe, Algeria; the basic refinery in Algeria to separate the heavy ends, the fuel oil residuals from the light ends; the fuel needed in Europe; the lighter ends desired for Puerto Rico; exploring the economics of this, how many petrochemicals would you have? What petrochemicals should you produce? Working back from the marketing to what you could sell, and then what you would produce -- an integrated proposal.

Rough estimates? Yes. But a preliminary feasibility study. And that was prepared by the 20th of September in 1963.

And there is a memorandum of September the 24th which also has a separate exhibit number, but it is right in this booklet, that reflects the follow-up, that Phillips is satisfied with the preliminary feasibility study, that this is doable, as extraordinary as it sounds, to have this triangular operation; the crude oil from Algiers, some product of that going to Europe, and another product going to Puerto Rico, and five departments are asked to follow up with in-depth studies.

Now, the contemporaneous memoranda indicate that Oscar Chapman is inquiring, "Well, Mr. Conn, what are you going to do?"

Mr. Conn says, "We are working on it. We are putting something together."

But again, it is Mr. Chapman whose been in this for nearly two years, who is saying, "WEll, I've got to know what you want me to present. Are you going to have a proposal that we can present to the Oil Import authorities or not?"

And Mr. Conn says, "Perhaps by the 14th of October."

And we find a memorandum on the 8th of October which reflects just how far Phillips had advanced in its preparation, and we find on the 8th of October, resulting from these communications with Mr. Chapman, now Mr. Coan is going to come into the story, that Mr. Waldby notes that they are to prepare a brochure that Mr. Chapman can use, and they are also to put in the formal requests for the corporate funds to finance going into this in depth.

Those are the two things that are settled upon early in October.

Now, there are meetings with Mr. Coan, and Mr. Coan is the one who introduces the Phillips officials to EDA, just as he had done for the succeeding persons in the past with whom he had worked.

And we have Mr. Coan providing counsel and advice to just how you best direct yourself to the concerns of EDA, and Phillips was responsive to this, and attempted to formulate its proposal consonent with what Mr. Coan was counseling as necessary to fit in with this long held program that EDA was seeking to develop.

By the early days of November, 1963, Phillips' management is convinced that they have something that they are prepared to go forward with, and it is at that time that Mr. Learned went to the office of Mr. Chapman, and we heard his testimony about how he settled upon a retainer of Mr. Chapman and his firm to represent Phillips in connection with the presentation of an oil import quota.

There were two aspects to that retainer. There was a retainer of $25,000 for a year, with 12,500 to be paid immediately and 12,500 six months later, for all of the work that it was contemplated that the Chapman firm would do.

And it was also provided that there would be a success fee, as Mr. Learned testified, of $400,000 to Mr. Chapman and his firm if this was accomplished.

Mr. Learned testified that he asked Mr. Chapman, "Do you have an obligation in this to anyone else?"

And Mr. Learned told us that Mr. Chapman said, "Only to Jack Coan," the man who had been working with Chapman right from December of 1961.

And the success fee arrangement and retainer were extended to Mr. Coan, and Mr. Coan's actual retainer agreement, which is an exhibit in evidence, is a letter from Mr. Coan, addressed to Mr. Waldby, and signed by Mr. Waldby, as he testified, on the authority of Mr. Learned.

Mr. Waldby recalled a conversation that Mr. Learned could not recall, at which the actual $2,000 a month retainer for Mr. Coan was agreed upon.

But Oscar Chapman, in response to Mr. Learned's inquiry of whether he had an obligation, provided in his arrangement with Phillips for a $100,000 success fee for Mr. Coan.

So that we have a retainer for Mr. Chapman of $25,000, and we have a success fee of $400,000 agreed upon, and we have a retainer of Mr. Coan's of $2,000 a month, and a success fee of $100,000.

I submit that here were the significant people who, if there was something being carried forward by private individuals, these two professionals, one a firm of attorneys in the case of Mr. Chapman, the other a firm of management consultants, Mr. Coan, Omega Management, were retained by Phillips, and it was with them that all of the subsequent work, subsequent to early November of 1963, goes forward.

Mr. Learned in this context of November 1963 said that he went to the office of Robert Anderson and he fixed it at the time of the Phillips' board meeting on the 18th or 19th of November 1963.

That he advised Robert Anderson at that time -- bear in mind this is the Robert Anderson whose limousine to Greenwich was depicted by Mr. Shippee, Mr. Willey as their regular means of transportation -- but Mr. Anderson recalls such a discussion but he tends to fix it at a later time.

There is very little difference in the recollection of Mr. Learned and of Mr. Anderson of what was said, namely, that Phillips is going to take an independent course. It was not a joint endeavor of any sort, Phillips was going to sponsor a project.

They had retained Oscar Chapman. They had retained Jack Coan. And bear in mind, up to that time, no one had ever paid a fee to Chapman or to Jack Coan. Yes, Chapman and his firm did get a fee for their service from the Gibbs group, Bruce Brown told us how the check bounced and that was replaced but ultimately it was all returned and there was no compensation.

Similarly, Mr. Coan had received nothing and the first actual retention -- there was a lot of talk back in

October of 1962 according to Mr. Shippee about all the commitments that were going to be made and how Mr. Chapman was going to be taken care of and Mr. Coan -- but, these professionals were never retained until Phillips retained them in 1963 to continue to work on what these two men had developed to that time.

Now, the story at that point -- I should say a word more regarding these conversations because Mr. Farrell is going to tell you that it was only the witness stand that Mr. Learned told of this meeting with Mt. Anderson. Well, running through this case is a very serious problem for many witnesses, and this can be taken into account for the plaintiff's witnesses that I am chastizing as well as for the defendant's witnesses, that when you try to recall today, you and I in January of 1976 what we did on January 23rd, 1963, how well do you think we would do?

Well make it just ten years ago or even nine. The depositions that were held where witnesses were being questioned about events and where their recollections were very inadequate, were held eight, nine, ten years after qhe events.

We have been gathering an enormous amount of material. You can see the boxes each day that have been lugged into the courtroom, both sides, and we have been pouring over this material and trying to find things to help people refresh themselves and put themselves back as to what they were doing in August of 1962 or November of 1963 so that they could see it once again as well as a recollection can be refreshed in the circumstances of that time.

Mr. Learned testified that his meeting with Mr. Anderson even a year later was triggered by thinking at the API meeting in Chicago of what he had done a year before at the API meeting, a very I submit, natural chain of recollection to be stimulated.

It is, of course, for you to apprise these witnesses and what they have testified to. But Mr. Anderson agrees as to what was said but he suggested it was much later.

Is there any earthly reason why Phillips would have gone around to Mr. Anderson at some later time to say we are going alone when the whole world knew at the later time that Mr. Anderson suggested -- he had first testified to this meeting without putting a date on it and then he reasoned backwards, well, I wouldn't have suggested that Mr. Wright and Mr. Willey and Mr. Shippee go to Bartlesville in 1965 to talk about a satellite plant if I had known that Phillips was going to do it alone.

Satellites -- Phillips was looking all over trying to find people to build a satellite to go with this. Mr. Leo Johnstone told you about how more than 100 companies were approached looking for chemical satellites to bring in around the core plant.

The notion that you fix the date of a conversation by reference to what you would have told Mr. Shippee, Mr. Willey and Mr. Wright about going to Bartlesville in January of 1965 to talk about a satellite, I submit, makes no sense at all.

On the other hand, there are contemporaneous memoranda of October 1963 in the Phillips' files where you have some of the Phillips personnel raising with one another, is there an obligation here to Mr. Anderson? Perhaps this is how it all came about. It is hard to put the story together all this time after, but it seems like a perfectly normal, reasonable thing.

There is no real doubt that Phillips was prosecuting an application and seeking the necessary oil allocation with which to build this project in Puerto Rico.

Now, as we go to --

Your Honor, how much time am I allowed?

THE COURT: Well, you have about ten minutes more. I won't cut you off in the middle of a sentence but I would like you to conclude by one o'clock if you could.

MR. MacCRATE: Thank you, your Honor.

THE COURT: It is a quarter of by my time. That clock up there is not accurate.

MR. MacCRATE: I can't claim the three minutes then?

THE COURT: I operate on Penn Central time.

MR. MacCRATE: Let us go quickly to December of --

JUROR NO. 5: I have to go to the bathroom.

THE COURT: We will take a ten minute recess.

(Recess.)

MR. MacCRATE: Let's pick up our story again in December of 1963.

Mr. Waldby in his testimony, having gone back and reviewed his expense records, was able to fix the period that he returned to Bartlesville from sustained travel as the 11th of December. And for the next six days, from the 11th to the 17th, he is in Bartlesville working on a proposal which is the culmination of the studies that began in August, were intensified in September, and for which all of the supporting documentation was developed from the ground up so that Phillips was ready to state to the EDA, yes, at long last, we have a proposal for a petrochemical facility to produce petrochemicals, responsive to EDA's request, desire, what they have been seeking for the last several years and what they have been talking about for substantially longer than that.

And Jack Coan and Diaz-Hernandez are in Bartlesville and Mr. Waldby testified about having breakfast with them in Bartlesville on the 16th of December and what is put together at that time is the basic Phillips presentation, yes, but commitment, of what they were prepared to undertake. It is a stipulated exhibit, it is J-43 and it is identified in the stipulation.

In this letter of December 16,1963, Mr. Learned, writing to Rafael Durand states:

> "Summarizing the results of our work Phillips can provide the following unique combination of advantages to this project: supply, use of proven technical knowledge and experience, use of the worldwide petrochemical marketing facilities of the organization",

taking note of the fact that it would not be immediately possible to consume all the petrochemicals in Puerto Rico, but having a total marketing plan.

While the letter is only three pages, it is filled with undertaking, affirmative undertaking and obligation to the Commonwealth that Phillips was making. And then the detailed summaries of the ten-year projections for what they hoped to do were set out.

Figures like these are solid, it isn't something that you put together in a minute. It is not something that is just put together for appearances. There is real substance there.

Mr. Diaz-Hernandez was on the witness stand and I asked him, I showed him an exhibit that is marked J-43, this letter in these proceedings and ask you if this is a copy of the letter that was taken by you from Bartlesville to San Juan in December of 1963.

"A Yes, it is.

"Q Did you discuss the letter with Mr. Durand in San Juan at that time?

"A Yes, sir.

"Q Do you recall where you had the conversation?

"A Not specifically.

"Q Do you recall what you said to Mr. Durand and what Mr. Durand said to you?

"A I remember he was very much pleased with the letter but the exact words I don't remember.

"Q Did you say anything to Mr. Durand at that time that you can recall?

"A I remember I explained to him the results of my visit. I told him that I was very much impressed with the Phillips operation. I told him that Phillips was a leader in patents and in spite of the fact that it was a relatively small company compared to big ones, the proportion of patents that they received every year was far greater than a company for its size. I explained to Mr. Durand that Phillips had of working joint ventures with producers of consumer goods and helping with investments. As a matter of fact, I remember that I specifically mentioned the case for Coca-Cola that was shown in the laboratory in Bartlesville was the things that I mentioned to Mr. Durand."

The result of this was an immediate invitation for Phillips to have their senior officials come to San Juan and to present themselves to Mr. Durand and the other officials of the Puerto Rican Economic Development Administration in the Port Industrial Bank, and to explain in person what it was that they were to do.

Now, what is prepared at that point is another unprofessional brochure. It is just the same kind of thing that was prepared by the Shippee group back nine months before, and which one of the copies of the Shippee brochure, which of the 26 that may have been floating around, or more, was used? I don't know. Someone took the first pages of the Shippee brochure and proceeded to two sentences, and then the ingenuity of counsel has tried to find related expressions. And maybe there is more. It was a totally unprofessional job, whowever was responsible for it.

Mr. Waldby assumes responsibility. He doesn't seem to have been there. He doesn't seem to have been in town at the time that the thing was actually finalized and put together. He was there for Christmas -- he came back the eve of Christmas and was there, or Christmas night, I should say, and was there until the 27th of December. But he does not disclaim responsibility. He had responsibility from the outset.

Now, Mr. Waldby has come forward and said, "Yes, I did get a copy of this from Mr. Conn and he has said that I was in charge of what was done."

Now, without the document we could not show Mr. Waldby, when he testified in his deposition, one of these copies of what I have described as this unprofessional brochure that was taken down to Puerto Rico, to San Juan, at the time that his testimony was taken. It was only subsequent to that, and he submitted a supplemental statement to his deposition, explaining all of the documents that had been located only after he testified, and how he was piecing things together, and he explained -- it is for you to judge him -- his fuller recollection, his substantially fuller recollection at this time and on his examination before trial.

Among the documents that he found -- not that he found, but that were found and were shown to Mr. Waldby, was this brochure that had the parallel language in it, that had the covering letter, that you remember Mr. Learned indicating that when he got on the plane in Memphis to go to San Juan, he signed the covering letter to Mr. Durand and two copies of that brochure were taken, along with slides and other materials, for a presentation that was held in San Juan.

But then what happened?

And this, when you are talking about concepts or anything else that has been taken by Phillips, or it is argued was taken by Phillips, bear this in mind: All of this was discarded completely.

Why? Because Mr. Learned and Mr. Durand thought this was nonsense.

And what do you have? You have Mr. Learned's letter to Mr. Durand, the basis of the Phillips presentation, when they go to the Oil Import Authority, when something is filed with the Oil Import Board, and the whole purpose of this thing that Prudential had put together was to be presented to the Oil Import Authorities.

That is their justification for their unprofessional job.

But Mr. Durand advised, "Skip it."

Mr. Learned was similarly dissatisfied, and Mr. Durand had Mr. Van Hyning, and Mr. Learned had Mr. Waldby work up a new Phillips presentation. But the new Phillips presentation was essentially just holding up higher and making central the Learned letter of December 16th that Mr. Diaz Hernandez had taken back to Mr. Durand and had led to the reception for Phillips and the interest of Durand in having them come down so he could meet them.

And right at that time Durand decided that EDA, at last, and for the first time, found anyone who was prepared to meet the conditions that they had laid down, and the result was that right in January a commitment of EDA to this project was made.

"We support you."

Durand, on the 14th of January -- this is a stipulated exhibit -- sends a telegram to the Secretary of the Interior, "Please consider an allocation for Phillips."

He writes a lengthy letter of some eight or more pages at the end of January to the Secretary of the Interior in support of the Phillips proposal.

And what happens to the brochure? Well, here we have a handwritten document, D-170, and it shows right on its face, "Proposal to Mr. R. Durand," and "From Mr. S. Learned."

Mr. Waldby has identified the handwriting here as that of Graham Renberg, one of the people assigned to work with Mr. Waldby on the new brochure, and Mr. Waldby then identifies the last page as being in his handwriting, and what does it say:

"Comments on brochure by Sam Van Hyning.

"1. Direct brochure to Durand."

In other words, scrap all this nonsense and get to the fundamentals that Phillips is responding to EDA and made the presentation that Stanley Learned sent to Rafael Durand with Diaz-Hernandez on the 16th of December and build whatever papers should accompany any submission to the Oil Import Authorities on that letter, and that is precisely what was done.

And you will recall that Mayaguez was selected in the Shippee, Willey and Young brochure as the site, and Mayaguez -- it appears in one of these columns somewhere along, and Phillips had Mayaguez in the summary sheet -- well, what does it say here?

"Comments on brochure by Sam Van Hyning.
Delete references to specific area as site for plants."

And then the Ti-Liang site study was included in the booklet that was taken down and it says, "Delete harbor section from report," just stuffing that was put into a report. Get down to the affirmative things that Phillips is proposing.

And that is precisely what happened. And this brochure, which is the actual piece filed with the Oil Import Authorities, doesn't have a word of this.

And another interesting thing, when I point to this, search through there and try to find one suggestion of what is described as the Shippee, Willey and Young concept. There is no reference to quasi-public utility. There is nothing of that concept which you are being asked to aware something for, for some reason, against Phillips and to Shippee, Willey and Young.

If this is the basis of the claim, well, I am still looking, myself, in those two columns for any indication of that concept.

But what is here and what was actually the basis for the oil import application is just -- you see the handwritten pages coming into printed form -- "Proposal to Mr. Rafael Durand." And in this stipulated exhibit, J-50, it is what was presented, and right behind the cover sheet is the December 16th letter, and what lies behind there is Phillips product through and through. It is the creation of the Phillips organization, bringing together the reasons why they feel they could do this job.

Now, against that background -- I am about to sit down. I know I have run out of time, but there is just one thought I would like to leave with you -- Phillips prides itself on keeping its obligations. It made very substantial obligations to the Government of Puerto Rico and you have heard some of them haven't worked out too well, but they are still there, and they are still pursuing them, and they are still keeping their word, and they felt they had a responsibility, yes, but they also obtained significant service from Mr. Oscar Chapman and his law firm and from Jack Coan and his management firm, and they paid them -- indeed they did. They recognized that service. They keep their obligations. They honor their individual obligations.

But when they are asked to pay for nothing, when it is suggested that they have an obligation because there was something, someone foolish enough in the Phillips organization to write that into a brochure, well, that can't be it because you are being asked to require Phillips to pay for a concept, and we search in vain there, and the story which was told on the witness stand, again and again, by anyone familiar with what Phillips has done in Puerto Rico, is that this is just not the same thing at all.

What you have is a petrochemical plant that was established there with all sorts of commitments never dreamed of for reinvestment, all the profits to go back for ten years and some of the problems that that has created.

Now, these are the contribution of Phillips. This is the effort of Phillips. And when you throw into the balance what was the contribution and the effort of Coan, what was the contribution and effort of Chapman, what was the contribution and effort, most importantly, of the originator of it all, EDA, and the response of Phillips, the only company to come forwawrd and to give this kind of undertaking, I submit that whatever these concepts are, if you are able to understand them, which I feel is one of the most difficult things to do or to value or to relate to any significant part of what Phillips had created, that one's conclusion can only be that the plaintiff is entitled to nothing in these proceedings.

Thank you.

THE COURT: Members of the jury, we will now break for our luncheon recess.

We will resume this afternoon at which time you will hear Mr. Farrell in behalf of the plaintiff, and after he has finished speaking in these cases I have the last word. So I ask you until you have heard everybody, including what I have to say, please keep an open mind and don't attempt to read any final conclusion in the case.

Now return, if you will, at 2.30. You may now withdraw from the courtroom.

(Jury left the courtroom.)

THE COURT: All right, gentlemen, we will be in recess.

(Luncheon recess.)

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AFTERNOON SESSION

(2.30 p.m.)

(Jury present.)

THE COURT: Good afternoon, members of the jury.

Mr. Farrell, you may make your closing argument.

MR. FARRELL: Thank you, your Honor.

Ladies and gentlemen, I guess I can say I have some good news and some bad news. The good news I am the last lawyer you are going to have to listen to in this case. The bad news is I am likely to speak as long as Mr. MacCrate did.

Mr. MacCrate, in spite of the time he took, left out a lot of the facts in this case and I think I will devote my time to filling in the spaces and will start in about June of 1962.

At that time there had been a number of people who worked with EDA, who had tried to move this project forward. Mr. Brown, with all his talent, had been unable to do it. He received a letter from Phillips saying they weren't interested. He had been unable to get a commitment from a chemical company.

Mr. Coan had been turned down by Mr. Fischbeck and Mr. Brown himself regarded the project as dead. He was so gloomy, in fact he didn't send his bill to Oscar Chapman and he went back to Murphy Oil where he became executive director.

In May of 1962 when Mr. Chapman spoke to Mr. Moore and Bruce Brown was there, they had set forth their conditions for a viable, workable project, to try to obtain the EDA support for the quota which, because of the economic benefit of the quota, was going to have to be the bedrock of this project.

They had said, and I am reading from J-33:

> "The conditions that would have to be met before anything was submitted formally to the United States Government, one, a chemical manufacturer was committed to buy the petrochemical raw materials and utilize them in Puerto Rico when the refinery went on stream. Oil companies were committed to provide the necessary petroleum raw materials and to offtake the refined petroleum products. A financing plan was perfected and complete and reliable management slate was developed."

They didn't have any of that, none. And where they had fallen down particularly was the chemical manufacturer, because Mr. Brown thought and Mr. Chapman thought, as Mr. Brown testified, both of them thought that in order for this project to get off the ground, you would have to have a commitment from a chemical company. They weren't even going to submit anything to anybody until they got this commitment.

Then in October, 1962, Prudential was brought in. Now, at that time it was not until Mr. Brown, Mr. Chapman who thought that this project was dead, the EDA thought it was dead. Mr. Diaz so testified on page 913, 919 of the transcript:

"Q And what was the status of those efforts in the summer of 1962?

"A The first group with which we dealt was disbanded in February or March of 1962. By disbanded I mean that the group could not come to an agreement among themselves."

Going on further:

"Q Thereafter, Mr. Diaz, did you speak to either Mr. Coan or Mr. Chapman concerning Mr. Brown's efforts?

"A By June or July of 1962, from the correspondence, we started getting the inkling that Mr. Bruce Brown was not going to be available or that Mr. Brown has decided that it was not feasible to put the project together."

2 p.m.

So at that point the EDA, Mr. Brown, everybody concerned, thought the project was not going to get off the ground.

In October of 1962, after Prudential had been asked to join the group, Mr. Irizarry received a letter from Mr. Coan telling him of the meeting where Prudential and the other people got together, and a copy of this went to Mr. Diaz, and he wrote:

"Ivan, this must be the last chance for C and C (Chapman and Coan). Too many promises. No action. Let's see."

So it was with a great deal of skepticism that the EDA was starting to work with the Prudential group and continuing to work with Messrs. Chapman and Coan.

Well, Prudential immediately saw fit to resolve one of the problems that Mr. Brown had not resolved, and that was to get a commitment from a petroleum company, to sell the raw materials, take back the refined product. And so Prudential went to Mr. Anderson, who was known to Mr. Shippee and Mr. Willey, and a former Secretary of the Treasury, and in fact, on a retainer to Phillips, to bring Phillips new projects, call their attention to new projects, and Mr. Anderson said, "Well, to move this along, you will need a major oil company as a strong partner, a strong participant to get this thing going, and I suggest that I talk to Phillips, see if they're interested."

And he called Mr. Adams, whose testimony was read to you yesterday, and didn't remember, that or anything else.

And shortly after Mr. Anderson's talk with Mr. Adams, Mr. -- he missed Mr. Adams, actually, Mr. Learned called him back, and Mr. Learned then sent Prudential this letter, which has been read during the trial, and I'm not going to read it all to you, but I will emphasize the final numbered paragraph, in which: "Phillips Petroleum Company was prepared to counsel with you and assist in the design and construction and operation of the proposed facilities."

Those were, by the way, a propose petrochemical complex. That is what is in the letter. That's what Mr. Anderson said to Mr. Learned.

He didn't say a refinery. It says "proposed petrochemical complex." That was what was going on in the minds of the Prudential people all the time.

Well, after that -- incidentally, Mr. MacCrate, in all the time he took up, he never mentioned that letter. I don't know if you noticed that, but he didn't.

From that time on, Prudential thought that

jklt 3

Phillips would be working with it in the attempt to resolve the problem that it held up everyone, up through Mr. Brown, in getting this project moving.

They were going to have to try to find some way that the EDA would make the project and bring its weight to bear on the Department of the Interior, to persuade the Department to grant an import quota so that the project would have the financial edge that it would need to have if it were to be built in Puerto Rico.

And the whole meeting, the whole operation from that time on, was that Prudential thought it was working with Phillips to that end.

Now, at first Prudential went down the same road as Brown. They had tried to get some commitments from chemical companies. And it wasn't working, and they had talked to several people. They talked to Monsanto, they talked to others. At the same time, they were talking to Mr. Anderson, who was on retainer from Phillips. In November or so, Mr. Learned has designated Mr. Conn, or Mr. Fischbeck, to meet with people from Prudential, to move the project ahead, and they met with them during those months, with the aim of counseling and assisting.

And it is from that point on, as we move ahead, that Prudential rightly thought, in fact knew, that it had a confidential relationship with Phillips, that anything that it told Phillips or disclosed to Phillips during those conversations, was disclosed for the purpose of moving this project ahead, in which they were both interested, whether they were partners or joint venturers or whatever, the fact was that both were aiming toward the same general goal, and therefore Prudential had no qualms at that time about disclosing anything that it knew to Phillips, because it wanted Phillips help -- of course. That was what Phillips was there for.

Sure, Phillips was also going to sell them the charge stock and buy back the petroleum, but that was way down the road. There had to be the counseling and assisting first, or there wasn't going to be anything to put the charge stock in.

So that was the purpose of these meetings with Phillips.

Now, as I said, it became clear as time went by that you weren't going to be able to get firm commitments from chemical companies. Oh, they'd say, "Well, you know, if you build the place, maybe we'll take some product, but we are not going to tie ourselves up now."

And so they kept running into this same problem that Brown and Chapman had run into in June of '62.

And so, at that point Prudential -- and Prudential is the plaintiff here, it is an oil company, it is a small oil company, but it is an oil company, and Mr. Shippee was chairman, Mr. Willey was president; that's how corporations operate, through presidents, chairmen, officers, but it doesn't make Prudential Oil Company any less the plaintiff.

And Messrs. Shippee, Willey and Young wrestled a little bit with this problem, and there had to be some way of breaking this log jam. You had to be able to tell the EDA, persuade or convince the EDA, that you really were going to have a petrochemical project.

On the other hand, you didn't seem to be able to put the whole thing together all at once and plot the satellites right down there with the core. And so in November and December they came up with a number of concepts that they thought would resolve this problem and still keep the basic elements that the EDA deemed so necessary, petrochemical complex. And that was that they would do without a commitment from the chemical company, but at the same time have the refinery sufficiently flexible so that the amounts of petrochemicals could be changed or increased, and they would find some way to guarantee that to the extent possible the feedstocks would stay on the island, be that by a quasi-public utility or a first refusal or some other arrangement, but the point was that the feedstock to the extent possible had to stay on the island, because you wanted companies to come to Puerto Rico to use these feedstocks and employ Puerto Ricans, not ship them to the United States or to Alabama, and finally that they would work with the EDA to promote investment in the satellite plants.

Now, Mr. MacCrate kind of ridiculed this. Maybe by hindsight it was pretty simple. But as I think you will understand, the fact that something looks simple by hindsight doesn't mean that it wasn't a good idea when it was thought of. And Mr. MacCrate said that he had had trouble understanding it, but Mr. Diaz didn't have any trouble.

I'm going to read you his testimony, page 923:

"Q Did you, as a representative of EDA, find Mr. Shippee's proposal attractive, Mr. Diaz?

"A Yes, I did.

"Q And tell us the reason.

"A The proposal incorporated several ideas which were appealing to me, because they were in accordance with the criteria that we have developed in due time as to what should be the characteristics of the third refinery. These ideas that they incorporated could be enumerated as follows:

"They were stimulating investment of local capital in the project; they were willing to appoint several prominent Puerto Ricans to the board of directors; they were willing to give preference to plants already located in Puerto Rico or willing to locate, to buy their petrochemical stocks as a result of this willingness to give this preference, the project implied a potential for future investment and future employment in satellite plants, using the production of the refinery.

"They were willing to design a refinery flexible enough to serve the future needs of Puerto Rico. But I must state that this willingness was stated in words. It was not backed by any design or any technical information that they might have submitted to me at the time. But at least the idea was there, that they were willing to do this, and they realized that the construction of the refinery should not be predicated on negotiating in advance long term contracts with users of the petrochemical feedstock; therefore there were all these characteristics, all these ideas were incorporated in this presentation; which were very attractive to us."

Now, at this point Prudential was on the verge of breaking the log jam that had so tied up Messrs Brown and Chapman up to that time.

The concept was attractive to EDA and prepared a brochure which is the first one, the first draft is Exhibit 214. We have a later draft and I will read from that in a little while just to compare -- Mr. MacCrate challenged you to find any of our concepts in the final project. I will try and help you and I think I can do that.

But, in any event, they prepared a brochure which they showed to Phillips in the course of the discussions with Fischbeck and Fischbeck put his name or allowed them to put his name in as vice-president of the new company.

He said it was all right. He said at the trial here that he objected vigorously until Mr. Young told him that it had been cleared all the way -- I don't know where -- then he said, he said it was all right if it would help.

The vigorous objection was brand new, never said that before although he had been deposed rather extensively before trial. And I am going to add on as I go along some of these differences between the trial and the depositions because Mr. MacCrate is certainly right to some extent, you can't recall events back ten years clearly as you can something that happened last year or last month. But when you have the massive changes in testimony that we are showing you here, I think you will begin to wonder whether Mr. McCrate isn't being a little too generous to his people because these are not questions of recollection, they are simply questions of covering up.

Now, we put the brochure together and we had given it to Mr. Anderson and some others. In the brochure it was clear that this was proposed to be a Prudential product. The proposed board of directors and officers, six out of the twelve directors were Prudential people. Shippee was to be chairman, Young and Willey were to be directors; Young was to be chief operating officer. This was all shown very clearly in the brochure.

It was also shown from the financial plan that in the proposed project Prudential as the manager and participant was to receive 27-1/2 per cent of the equity in the project. That was in the financial plan and it was all set out there and it was read by the people that we gave it to.

This brochure was read by lots of people in

Phillips. It was the first thing that Waldby said he read when he was assigned to this. It was read by Fischbeck, presumably read by Coan who gave it to Waldby, and this brochure in effect had a price tag on it. It said well, if you want to join us, want to take this project, work with it, our price is 27-1/2 per cent.

This is what Prudential expected to get. It might not have succeeded but if it did succeed, it didn't have to negotiate away something in order to succeed, that is what they wanted. That was the price tag and Phillips had the brochure, read it and knew it.

In addition to the copies that were specifically traced to Phillips, the one that went to Coan and Waldby, was the one to Holland, one turned up in their files. Mr. Holland couldn't explain it but there it was. So Phillips knew from the time this document was shown to them what the concepts were and what Prudential wanted. They knew this from all of these people, Anderson, Waldby, Coan, Fischbeck, who read that brochure.

Then they conducted meetings, lots of people from Phillips -- Fischbeck, Coan, Page, Smith, Jackson -- top people, New York office. Phillips did a study of crude samples. Fischbeck's diary says one meeting lasted four and a half hours. I think that Mr. Fischbeck attempted to pooh-pooh the meeting somewhat but a four and a half-hour meeting is rather substantial on any subject.

They discussed using naphtha instead of crude oil and that was a way of increading petrochemical production, which was the object of all of it.

They reviewed the concepts, talked about the way of making the refinery flexible, the marketing of the petrochemicals, all these things that had to be discussed before this project could get off the ground and all this in the context of counseling and assisting, as Mr. Prudential said, Phillips was counseling and assisting.

One of the reasons there was all this talk about marketing was that that would be a problem without a commitment from a chemical company. If you weren't going to be ablie to sell on the Island, temporarily at least, you would have to sell in other places. That is why Fischbeck was asked to prepare a marketing report.

Now, there was testimony by Mr. Keeler back some years ago that he and Mr. Learned had gone to Washington on this project to see Mr. Chapman and the Department of the Interior.

Mr. Learned said on the stand he went down with Mr. Hewitt to make another presentation having nothing to do with this. Well, he may have, although why Mr.

Keeler would say that he and Learned went and Mr. Learned would say that he and Hewitt went and tried to fuse them into the same I don't know.

Mr. Learned mentioned this trip and said that he had gone with Keeler, I could understand that. That might be a slip in his recollection. But it was Keeler that said they took the trip, not Mr. Learned, and why when Learned told about it Keeler wasn't even involved.

So at the meeting, the four and a half-hour meeting with Mr. Fischbeck, Mr. Shippee told Mr. Fischbeck that in order to get a quota Phillips would have to take a little more active role and apply for the quota in its name because the applicant according to the rules that Mr. Chapman was going to apply under, and I did during the trial -- I won't take your time to read it now -- but during the trial I read it to you and it stated specifically a section of that regulation required an importing history and, therefore, it had to be somebody like Phillips who would apply for the quota.

2 Fischbeck, first his testimony was that this conversation didn't take place. But when faced with his deposition testimony, he admitted what he said on his deposition and he pooh-poohed it, said the marketing report would be a phenomenal expenditure, wouldn't possibly do

them.

But it seems rather strane even if he was out of town as he said he was, that Mr. Shippee would write letters to Mr. Chapman that Mr. Fischbeck was doing a marketing report, send Mr. Fischbeck a copy of the letter to Mr. Chapman, send Mr. Fischbeck two letters. It seems kind of strange that Mr. Shippee -- if you wanted to look at it the worst, you might say that Mr. Shippee wrote to Fischbeck and kept bugging him for the report but he wrote to Chapman and said Fischbeck is preparing a report and sent a copy of that to Fischbeck and it seems a little strange if Mr. Fischbeck hadn't committed himself to do something, of course he committed himself to do the marketing report.

The problem was pretty clear, he ran into trouble from his superiors. So we didn't know that right away. He finally wrote April 29, said that he wasn't going to do it.

Meanwhile, we had gotten an answer from Chapman's secretary, everything was all right. But during this period, some time indeed before April 11, Mr. Keeler was supposed to have gone to Mr. Chapman or called him in Washington and said that Phillips isn't going ahead with it until Prudential got a quota.

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That's a neat game. You go to Phillips and say look, in order to move this forward you get the quota because you got the oil importing history. Phillips says okay. You get the quota and what is the reason for that? It is easy. If we don't get the quota, they have the brochure, they have all this stuff, they can just pick up the pieces and that is just what they intended to do and it is just what they did eventually.

So we tried to pull the thing together again and Mr. Shippee wrote to Mr. Anderson as a go-between, between Prudential and Phillips and he said there is a problem now. Mrq Fischbeck says he won't do the marketing report and we will have to proceed as best we can.

He said to Anderson if there is any area of reconsideration for Phillips to supply us with the simplified plan prior to presentation, it might help the outcome. He is asking Anderson, in other words, to try and intercede with Phillips to get them to change their mind.

We know now they were never going to change their mind because they were waiting for Prudential to flop. But at that time Shippee didn't know it so he thought maybe Anderson would help out.

And, at the same time, Mr. Shippee wrote to ~~Mr.~~ Chapman and he sent him a copy, a couple of copies of the brochure. Mr. MacCrate referred to this as the final draft. There was a lot of talk about who copied this and when it was copied but it doesn't matter.

Actually Mr. Holland confirmed Mr. Shippee's more than he contradicted it. The date is wrong, that was about the difference.

Incidentally, if Mr. MacCrate was trying to say that Mr. Shippee was using this reproduction as a way of putting this brochure to Phillips' knowledge, we don't need that. Mr. Waldby finally admitted he got it from Mr. Conn who got it from Mr. Chapman. There is no mystery about this, there never was.

This brochure came directly from Mr. Chapman, probably one of the ones we sent with this letter of May 29 -- undoubtedly it was, maybe a copy.

So on June 13, 1963, Mr. Shippee again wrote to Mr. Anderson and in Plaintiff's Exhibit 118 he said he would like to meet to implement the presentawtion, that is this brochure with additional marketing information which may be obtained from Phillips through your good offices. Again, trying to get Phillips to recognize we were together in this or so we thought, but we weren't But Phillips were the only ones who knew that then.

4 p.m.

And they held a meeting. Now, Mr. MacCrate has made a lot about the date of that meeting, but it is pretty clear it happened the day before Mr. Shippee's air crash. That would be a hard meeting to forget, hard date to forget. And there is no testimony from anybody that that meeting didn't take place.

Mr. Anderson testified about it. Mr. Shipeee did, and Mr. Young. Now, Mr. Anderson, whose testimony I will read about that meeting, he said that the purpose of the meeting, page 754, he said:

"Q And can you tell me to the best of your recollection the substance of the discussion at that meeting?

"A We discussed the ways in which to try to make a logical, presentable and valid case to the Import Board concerning the acquisition of an import quota for the establishment of a core chemical plant in Puerto Rico and to try to allocate some measure of responsibility among those who were present, as to the various tasks or portion of the task which they would undertake.

"Q Can you tell me to the best of your recollection how these responsibilities were allocated?

"A So far as I can recall, Mr. Chapman was to handle all of the matters in Washington. I was to be available for consultation by any of the group. I was to try to maintain liason as was required and desired between Phillips and the group. I was to consult with Mr. Chapman when Mr. Chapman thought it was important, and Mr. Shippee and Mr. Wright and others were to try to develop other sources of utilization of products that might come out of the plant."

That is a clear, concise statement of what happened at that meeting. And obviously Mr. Anderson fulfilled his obligations.

But some of the others were a little less fortunate.

The following day Mr. Shippee was injured in the plane crash. And it is about that time that the vultures, there wasn't a body, he lived through that plane crash, but there were vultures anyway, they started to fly around.

They said, "WEll now, we've got the brochure, Shippee's out of the picture, what do we need them for?"

And so, according to Mr. Learned, who has difficult memory, very old man, he said that Mr. Chapman called him out of the blue. Didn't know Chapman. Never met him. Just called him up. Page 1554:

"Q Do I understand your testimony correctly that in August of 1963 Mr. Chapman called you out of the blue?

"A Yes, he did.

"Q You had never previously spoken to the man?

"A I don't remember any previous conversation.

"Q You never previously met the man?

"A I don't remember ever meeting him before that.

"Q He referred to an import quota under the Puerto Rican project, did he not?

"A Yes, he said that, as I have testified earlier, that he thought that if Phillips was ineterested, and that Phillips was willing to limit the exportation of gasoline to something less than fifty percent, that there was a strong possibility that an import quota could be gotten for a project, petrochemical project, in Puerto Rico.

"Q What you knew, as of August, 1963, so far as you knew, Prudential was still working in connection with the quota, weren't they?

"A I don't know. I didn't know whether they were."

Well, I submit that that is beyond belief, for several reasons:

Phillips had now turned this project down to Chapman's knowledge, three times.

Mr. Fischbeck turned down Mr. Coan in April of '62.

Mr. Hewitt, way high up, had turned down Mr.

Brown in June of '62.

Phillips had just told Chapman, Prudential would have to get its own quota, "We're not interested."

And yet, Mr. Chapman, with that history, would call PHillips out of the blue? Why, that's ridiculous. There were any number of other oil companies that hadn't said no. Could have called Shell, Mobil, Esso, millions. But no, he called Phillips. And, he called him out of the blue.

Well, the fact is it is very clear that Mr. Anderson had done what he promised he'd do in the July meeting and he called Phillips, and Phillips was waiting for the call, if in fact Mr. Learned didn't call Mr. Chapman, which is closer to Mr. Chapman's version of that same conversation, and the vultures all met in Washington on August 7, 1963.

And Mr. Chapman's associate, Mr. Shea, wrote a memorandum where he says:

"On Wednesday, August 7th, Mr. Chapman and myself had lunch with Carsten Slack and Miller W. Conn. The purpose of the luncheon was to give Mr. Conn an opportunity to begin a study to determine whether or not Phillips would take an active interest in the establishment of a chemical project in Puerto Rico. It was felt that the luncheon was a result of Mr. Chapman's conversation with Bob Anderson in New York City."

Well, where did Mr. Shea get that? Mr. Shea was new on the scene. We never saw him before and we are not going to see him again. He just steps on the stage as does that memo.

So it happens in the conversation. It is the only inference you can draw. Mr. Chapman and Mr. Conn discussed the contact between Mr. Chapman and Mr. Anderson.

And one other thing Mr. Shea said, although we don't now need Mr. Shea's testimony for it, because Mr. Waldby's finally admitted it;

"Mr. Conn took a copy of the present study that we have. Mr. Chapman pointed out the areas in which it has to be improved."

There it is. And he gave Mr. Conn the brochure that Mr. MacCrate spent a lot of time sneering at, but Mr. Conn certainly wanted to take with him.

And Mr. Conn knew what it would be for, because he wrote a memo of the same conversation. He said, "Undertake a study, refinery operations, linked somehow to our European refining possibilities. And the above will be accomplished at the earliest possible moment after which we in New York will report to Bartlesville management with a recommendation regarding our further interest in developing a brochure for presentation to the Department of Interior."

So he was taking the brochure and they were going to do their own brochure. That's what it was for. That is what he took it for.

Now we get a lot of evidence about the PEA project. About the Algerian-- the vast thinking that went into that, concepts that are beyond the mind of some of our ordinary men.

But the fact is, ladies and gentlemen, there wasn't a drop of Algerian oil that ever went into that petrochemical complex. It all came from the western hemisphere. And that was exactly what was proposed from the beginning. You were going to have to use oil from the western hemisphere because it was the only thing that was going to be politically feasible.

The State Department, who in fact Mr. Learned wrote to finally, to say he would use western hemisphere oil, simply insisted as a condition of this quota that "You are going to use western hemisphere oil." So all this stuff about Algeria just comes on and then fades away, because if the project went ahead, you weren't going to be able to use Algerian oil. And I might also ask, if that was really Phillips' purpose, that is, to use Algerian oil, and when the State Department said, "You can't use Algerian oil," why did they go ahead with the project? They could have said, "Well, gee, this no longer fits in with our plans. We have to do something with this Algerian oil."

They didn't stop. They just went right ahead. They wanted the import quota. They wanted that project in Puerto Rico. They didn't care what oil they used in it.

Now, about the same time, an urgent telegram:

"Brainstorm with Mr. Keeler."

Mr. Fischbeck said that Mr. Conn always put "Urgent" so he didn't pay much attention to it. But the fact is somebody at PHillips thought it was pretty important. Mr. Conn was Mr. Fischbeck's superior. And Mr. Conn also sent a telegram to Mr. Parker, his superior, and he said, "Reference PEA project, Chapman telephoned just now and I gave him the same abbreviated review of the PEA project as I gave to you. Chapman stated that he would contact Bill Keeler in the next day or so in order to work out the relationship between Keeler, Chapman, Anderson, etc."

Told W.W.K., Mr. Parker wrote. He told Hewitt. Anderson was known to Mr. Conn, and at that point it was quite clear that they knew he and Prudential were involved.

Mr. Conn also wrote a letter on November 4th to Mr. Parker, same thing.

Now at this point, Mr. Conn had come back from Washington with the brochure in hand, and Mr. Waldby, who, as he testified at that time, didn't know anything about Puerto Rico, didn't know anything about Core, didn't know anything about oil import allocations, was assigned to the project, and Mr. Conn told them to keep the brochure confidential. Keep it confidential. This was the brochure that had no ideas, there was nothing in it, junk. Junk. Keep it confidential. It is confidential junk.

So Mr. Waldby read it. The first thing he ever read about cores, Puerto Rico or anything else, from what I got from his testimony. And after that he said he didn't invent any other concepts. Didn't have to. It was all there.

Now, I'm going to read you Mr. Waldby's testimony on that. He said, "After receipt of this brochure, sir, what specific concepts did you invent with regard to any Puert Rican petrochemical complext?

"A I don't know that myself that I invented any."

Well, that was the man in charge. He didn't invent any =- no concepts, not from Mr. Waldby.

So he read over the brochure, and at that point, according to Mr. Chapman, I mean Mr. Learned, some months later, there was a conversation in which Mr. Learned and Mr.

Adams came and told Mr. Anderson that they were going to follow an independent course.

Mr. Learned also said that when he negotiated the retainer agreement with Mr. Chapman in November, he said to Mr. Chapman that he wanted to know if they owed any other people any obligations, and Mr. Chapman mentioned only Mr. Coan.

Well, all right, Mr. Shippee was still not himself. There probably wasn't any reason for them to worry about Prudential, except that they didn't want Prudential starting to muddy up the waters here, say that Prudential had some interest in this project, so they just played a little cool.

They said, "Let's just let the thing ride. We won't say anyhing to Prudential, they won't say anything to us. We'll assume that we are going ahead with the thing."

And that's what they did. And that conversation didn't take place in November of 1963. Mr. Learned, again, forgot, according to Mr. MacCrate, but that conversation was made up, or the date of it was made up the following way:

Mr. Learned's deposition was taken before Mr. Anderson's in this case, and we asked him, you head Mr. Marks read it back to him, his testimony, and he said "I didn't have any conversations with Mr. Anderson between 1962 and

1965" and he said it several times.

Then Mr. Anderson testified, in his deposition, not here in court, and he said, "They came around 1965 or so." He placed the time because of Mr. Wright's trip to Bartlesville with Mr. Shippee and Mr. Willey.

And so Mr. Anderson is an uninterested witness and he was going to appear at the trial. So they had to figure out wh at they are going to do with this.

Now, the game plan at first was to deny it. We took Mr. Adams' testimony. He is the chairman of the board that doesn't do anything. Never heard of Puerto Rico, never heard of a quota, never heard of Prudential, never heard of anaything. We asked him about this conversation with Mr. Anderson. Never took place. Never took place.

Well, Mr. Adams' game plan was, we will just deny it.

But that won't work exactly because there was Mr. Anderson, you people might believe him, so change the date and say "We forgot." That's all.

So then Mr. Fischbeck and Mr. Waldby and all these people -- I'm going to tread you a little testimony here -- they discussed the brochure. And here's what Mr. Fischbeck said, page 1452:

"Q Did you discuss a proposed petrochemical project in Puerto Rico?

"A We discussed the refinery and what had been characterized as Mr. Shippee's core project, which was a simplified crude oil refinery and a platformer, and Shippee's ideas about other things."

These were all these non-existent concepts that they were talking about. But apparently they were real enough for Mr. Fischbeck to talk to Mr. Waldby and Mr. Conn about.

And so we come to the brochure, which has the sentences lifted from it.

Now, Mr. MacCrate has tried to avoid that by saying, "Well, look, they don't say anything, it says Mayaguez, and they didn't go to Mayaguez." That's not the point. These sentences aren't what we are complaining about. I'm sure you people know by now, this isn't a copyright case, we are not complaining that they used those sentences or that those sentences contained the idea.

That brochure, though, is the smoking gun. That shows where they got their ideas, because they lifted some sentences. It is a fingerprint. It is a clue. That's what it is, and it is a clue that they haven't been able to deny.

Now, I will review, since Mr. MacCrate had such trouble, I may even edify him, some of these concepts and try to show you how Phillips used them.

Now, we had said that there was no prior commitment necessary from a chemical company, but you could use the core plant and hopefully the satellites would develop.

Yesterday, Mr. MacCrate or Mr. Rigney read into the record Mr. Shippee's testimony about his concepts, page 1941, and Mr. Shippee said, and Mr. Rigney read, among other things:

"We merely presented to him (that means the EDA) what we considered an impasse, because we had met with chemical companies, because no one had been successful to date in the interesting of chemical companies to make commitments. We presented to him what we considered the fallacy of trying to start with chemical company commitments, and told him that if we approached it, that it would take ten years. The first year there may be no chemical company. The second year there may be a couple. By the end of ten years we would reach his goal," the idea being that if you have no commitment but you are still committed to making petrochemicals, you will attract chemical companies.

And that was the way to persuade the EDA and the Department of the Interior that you were really talking about a petrochemical project.

Now, I will read you something else, and this is:

"We were just checking and found as of this morning there are 25 industries operated by other companies which are dependent on the production of ethylene from this plant. I think this illustrates the very point we are trying to get at, that once you have low cost raw material, it is very easy to induce people to come down and locate satellite plants."

That wasn't Mr. Shippee, although it might well have been. That was Mr. Keeler before the Department of the Interior, in 1965, when he was testifying in favor of the PHillips project.

We are not worried about the words. It is the same idea.

Now, we suggested that the refinery be flexible.

Now, I don't know if you remember Mr..Waldby's testimony on that, but Mr. Waldby said, page 1751:

"Q In other words, there was a fair amount of flexibility with regard to the petrochemicals that would be produced from this core plant as you described it, is that a fair statement?

"A Yes, that is a fair statement. It also depended quite a lot on the characteristics of the feedstock."

There is some testimony I won't read you because it might take too long and I'm not even sure I can pronounce the words correctly, but he went through the charts, he says "Yes, you could increase that, you could decrease that."

That is flexibility under any definition. And he himself said that it was flexible.

But there is more. We take Defendant's Exhibit 205, the projection by Phillips in 1965, April 13. There is a table in it. There is a table which shows projections.

In 1971 they are going to produce 24,800 barrels of motor fuel per day.

1972, they are going to produce 24,738 barrels per day of petroleum.

In 1973 it drops to 21,600 barrels per day of petroleum and there is an equivalent increase in petrochemicals.

The following year, 1974 it drops, projected, to 19,730 barells per day and again an equivalent increase in the petrochemicals.

But they didn't use any of our ideas, it is all unfeasible and they had experts tell you that.

Now, we could also take Joint Exhibit 50 which is the final thing, about which Mr. MacCrate said nothing and it is the same thing. They say the company which sponsors the establishment of the core chemical plant ought to have outstanding capability, investment capability and refinery engineering and successful experience capable of developing a petrochemical project. Feedstock and processing steps should be selected to minimize the production of refinery products such as motor fuel. The same thing, flexible.

Now, there has been a lot of talk about quasi-public utility which turned out -- the point of that, of course, was to keep the feedstocks in the Islsnd and try to persuade EDA and convince EDA that you were going to keep them on the Island. A quasi public-utility would be a way of doing it.

It ended up, as it happens, in the first refusal in the agreement between EDA and Phillips, this was what they were going to guarantee to keep the feed streams on the Island.

But Diaz and Shippee testified the point was to keep the feed streams on the Island, whether by a quasi-public utility or some other way. It was eventually done by first refusal but the point of keeping the feed streams on the Island to the extent that you could, was again taken from the original concept developed by Prudential.

Now, we had another one. We were going to promote and I will read this right from the brochure since I don't want to be accused of not paying enough attention to the brochure and I will read from that, in the provision in the charter of the petrochemical company and said that the company will also promote additional chemical and petrochemical projects related to the development of the petrochemical industry.

In other words, to work with EDA and invest their money in satellites and try to get other people to do the same thing.

So we find in Mr. Learned's famous letter of December 16, 1963, in addition we will place all of the technical, marketing capability of Phillips Petroleum Company in support of efforts to develop additional investment by ourselves and by our customers. The same thing, promoting investment in satellites.

That is what we said, that is what Mr. Learned said. It is not the same words but we are not complaining about the words, we are complaining about the ideas.

There are a couple of other things we did say but we are not taking credit for those because it is true, it came before we did. We did say probably the best way would be to use naphtha and we did suggest it and it had to be Venezuelan and we suggested it but the four basic ideas were there in our brochure and in our conversations and all emerged at some point in Phillips' brochure and in Phillips' memorandum and in Phillips' presentation to the Department of the Interior.

The fact that we were going to present our brochure to the Department of the Interior and Mr. Van Hyning said, no, you should address it to EDA, escapes me because -- especially since the final product that was addressed to Mr. Durand was submitted to the Department of the Interior.

It didn't say on it "To the Department of the Interior" but all we had to do really would be to tear off the cover page. We are not taking credit for the cover page so I won't take any more time with that.

At this point Mr. MacCrate has tried to show and the defendant generally tried to show that all of these concepts were well known and that we didn't contribute anything. That is what I suppose we were keeping confidential. But I think it is fair to say that a lot of things are well known when you develop a new concept.

We always had been taught in school that Edison invented the electric bulb, the incandescent lamp. He didn't do exactly that. There were a lot of patents on lamps before Edison came along.

It was well known if you go into this thing that if you ran an electric current through a wire the current would glow -- the wire would glow. That is how a toaster works and the only thing is it is designed for heat and not light.

Everybody also knew that if you put it in a vacuum bulb it won't burn up and people had gotten patents. The trouble with these that they only burned for no more than minutes or hours because nobody knew what wire to use, what the substance should be, what the wire should be made of.

That is what Edison did. He found the substance that would work and the bulb would stay lit not for minutes or hours but days and weeks and months and I am sure that people said, like Mr. Brown, I had that idea, I had that idea, the idea was not new.

Well, Edison is now the man that all the school kids know invented the light bulb because he made it work. That is what we did.

Sure this core plant although it is not clear whether Mr. Fischbeck ever heard of it. There were two different ways he testified, he never heard of it until 1966 but admits he read the brochure, we caught him on that. But that is the contribution that Prudential made, they got the thing to work.

Now, at this point Prudential was sort of in a position, talking now about -- we not only incidentally have very clearly shown now that they copied the brochure, took our concepts, but what they did after that was just covered up by lying. They covered up by lying.

Mr. Keeler, we read his deposition. We asked him how much was the same and he swore at us.

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Mr. Waldby made a deposition, said he never recollected seeing our brochure. He corrected that with an affidavit, corrected it with an affidavit before trial, which didn't add much. It was the first time that he ever admitted seeing this, that was to you. That is what a jury will do, he couldn't pull it off a third time. He had to admit he had seen it. But, of course, he had a story as to why he didn't remember the other times.

So the whole thing was take the concept, cover it up, just stonewall it, and that is what happened throughout this litigation.

Now, at this point, Prudential was kind of like the man whose throat had been cut but didn't know it because he hadn't tried to turn his head. We thought that they were still working with us and so in January, 1964, the presentation was made, the first application was made to the Department of Interior and Mr. Young worked on some satellites and Mr. Shippee came back and did the same kind of thing.

Then in June 1964, there were hearings before the Oil Import Board. Now, at that point Mr. Shippee writes to Mr. Anderson. He says that it may be a good idea -- Mr. Coan told me anyway that Mr. Durand would like to talk to you about his testimony and that it might be a good thing for you to do so so won't you arrange to meet.

Now, let me ask you, if in November of 1 963, as Mr. Learned has testified, we had been told that Phillips was going to take an independent course, would there be any reason for Prudential in July 1964 to encourage Mr. Anderson to discuss Mr. Durand's testimony and insist in getting the oil import quota? Of course not.

The point was that Prudential was being kept in the dark. It was all Mr. Coan saying don't worry, Mr. Anderson saying don't worry, and the project was moving ahead and Prudential didn't know that it was no longer involved.

So after a rather unsatisfactory meeting with Mr. Learned, Mr. Willey went out to see Mr. Learned. Mr. Learned doesn't remember it. We got a memo of Mr. Willey which says that he presened it to him and it is an exhibit. I won't take my time and your time by reading it. It gives a very brief history of the project and it is available during your deliberations, all of these things are if you want to see them. I am mentioning it because Mr. Willey says he took it out there and it is what he said he showed to Mr. Learned.

But after some unsatisfactory meetings finally we went to see Mr. Johnstone. That was in early 1966. All this time Mr. Anderson had been trying to cover over the differences between the parties. I don't mean trying to suppress them, trying to resolve them and Mr. Shippee finally went to see Mr. Johnstone and he came up with the idea if Phillips would finance a PVC, a polyvinyl chloride plant for six or eight million and buy it back, that would in effect give Prudential a six or eight million-dollar satellite and it would take care of their obligation if they were going to have no interest in the core project, and Phillips would have a satellite after a time.

We went to see Mr. Johnstone and told him that. Mr. Johnstone's memorandum talks about everything -- which he says he destroyed. Somebody didn't destroy it, we got it. He talked about doing a favor. But he testified under cross-examination, he said at 1655:

"Q Didn't you report to your management that Prudential was of the view that Phillips had an obligation to Prudential?

"A I interpreted from that he said that he

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was implying an obligation."

That was the point. Shippee at that time, without incidentally knowing what we know now about the copying and the direct use of our ideas and concepts as blatantly as actually had been done, or the profits that the core plant was going to eventually generate, he put a price of six or eight million for Prudential and thought that would be a fair way of resolving it.

But the report came back to Mr. Johnstone that we don't have any obligation to Prudential, we are not recognizing any obligation to Prudential. We are not going to do anything like that. If they want a satellite let them buy it themselves.

So at that point Prudential had to decide what it would do. Although Mr. Anderson said that a little company shouldn't sue a big company, there was no way out and and, finally, Prudential brought a lawsuit.

During this lawsuit Mr. Adams, Mr. Learned, Mr. Fischbeck, Mr. Waldby, all denied ever seeing Prudential's brochure until Mr. Waldby came in a couple of days ago. Just covered up everything they had done.

Now, it is up to you as part of your job here in the event you find that Prudential is entitled to be awarded damages, to determine the amount.

We had some experts. We had originally said in our brochure if Prudential was to become involved in this project for managing, being involved, it would be 27 per cent. And Phillips took that brochure, Phillips knew what it said. It was like a price tag, you didn't have to take it but if you took it, that was the price.

We had our expert, two of them and they had their experts who said that the core plant was worth $10 million the day they opened the door, although it cost $70 million to construct. And that is the way I suppose Phillips grew to be a big oil company by making silly investments like that.

But I am not sure that the experts were any more than rather guidance for you because we didn't know, all these experts did this as of 1968, projecting, we didn't know what the actual figures were.

Mr. Rosenthal based them more or less on a three-year average, just chosen from the middle years that the core operated. Because the experts really had to work that way, they didn't have the projections, didn't have the actual final figures for 1973 and 1974. That was about all they could do.

Although Mr. Walker was able to confirm his projections to some extent from the figures up to 1972.

But we do have two hard facts in the record at this point.

First, that Phillips purchased back a quarter interest in the plant, in the core facility from PRIDCO in 1970, 1969-1970, for $18 million.

(Continued on next page.)

And we have Mr. Johnstone's testimony that projected through 1975, the projects of the Core were 108,000,000 and that it was projected thatit would earn another 10 to 15 million per year until 1979, which makes a projection roughly through 1979 of 160,000,000.

Now, that doesn't mean the core plant is going to be closed down as of 1979 or has to be. It is going to be there. It will go on. It will go on a number of years more. But that was the projection through 1979.

There has been some talk about the value of the quota, and Mr. MacCrate had Mr. Brown review that there were all these terrible things in the quota that no other quota had, it wasn't transferrable, they had to meet certain obligations, they had to use the product in the core plant. But I think we can judge that -- we don't really need experts to tell us whether that quota was valuable because look at the hullabaloo from the other oil companies. That's all you need to know. They knew all that. They said,

"We don't care whether they haveto use it in the core plant and taking on all these commitments. This is a license to steal and we are against it."

And every oil company -- not every, but they are in the record here, and you can look at them -- I won't read you the list, but there was a list of names read to you by one of the witnesses, all those oil companies came and said, "Don't give ~~this~~ quota to Phillips."

Was that because Phillips was undertaking such a burden? They were sorry for PHillips, I suppose. They didn't want them to undertake these terrible burdens that they were going to have to undertake if they built the core plant.

No, it wasn't that. The oil companies knew the value of this quota, even if there were some strings attached. And Mr. Brown, in fact, admitted it on cross, that the other oil companies were not very happy to see this.

So there was value in the quota.

Now, it's been brought out that Phillips also invested the profits, had to invest the profits. There are two points on that.

The firstis they invested a lot of the profits and more in a fiber plant. But that is their investment decision. There was testimony that was read to you by Mr. Learned that indicated that it was quite doubtful that that was going to be profitable at least for a time.

PRIDCO saw that it wasn't going to be profitable and declined to participate. But Phillips wanted to go ahead and build a fibers plant. And it was kind of the price of admission for breaking into that field.

But their position now seems to be that, "Well, since we threw the money away, we are really in bad shape. You can't look at these profits. All these profits went down the drain, because we invested them all in this fiber plant that didn't work out."

Well, Prudential didn't have any input into that decision to build a fiber plant. If we had a 25 percent interest to determine, I didn't know what we would have done, but we would have been consulted. But we were not consulted. They did that all themselves. They don't like partners. That's why they bought out PRIDCO. That's what Mr. Moore said.

And so the fact that Phillips, after earning such profits from the Core, invested in a bad business deal doesn't mean that the slate has been wiped clean, and that there is really, even if you find that Prudential is entitled to a share, there is nothing to share, because we were not responsible for the loss of that money.

Now, there is another point. Mr. Moore said that really the basic difference between him and Mr. Walker in evaluating the plant, the core plant, was the obligation to reinvest. contained in this agreement, Joint Exhibit 40, bewteen Phillips and PRIDCO, and the Government of Puerto Rico. That was the main reason why he thought that the plant was worthless when they opened the door than it cost to build.

And there's also been some talk about Mr. Moore again. He said that the wuota was not exactly specualtive, he said, but the quota system was the basis of this project, and therefore, if you were back in 1968, you'd have to consider whether the quota system would really go ahead for ten years, the price of crude might go up, OPEK, all of these new things -- terrible.

And so he said, "For that reason I was unable to find that this had any value."

But there is a clause in the contract, J-70, between Phillips and the EDA and the Commonwealth of Puerto Rico, and after all the usual language about acts of God and strikes, quarrantines, lock-outs, it says, "Provided further that neither Phillips nor the Core shall be held to be in breach or non-compliance under this agreement if the controls on imports into the United States and Puerto Rico of crude oil, unfinished oils or finished petroleum products, established by Presidential proclamation 3279 as amended are abolished, or if the allocation granted to Phillips to import into Puerto Rico 50,000 barrels a day is terminated."

In other words, they had their own built-in protection. The quota system ended effectively, with the

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price going up in 1973, that was the testimony -- 1973 the Core made more money than it ever had before. 1974 it was just about as good.

So the fact that the core plant was originally based on the quota system, doesn't mean it is not profitable, and in addition, Phillips is relieved of a lot of these strings.

So what you really have now is a plant which is projected to earn $160,000,000 through 1979. That is the basic fact for you to consider.

And the further fact that Prudential entered this, they said they wanted 27-1/2 percent of any project, and moreover, that Prudential will only receive what you give it. It's not going to have the plant. Phillips is still going to have the plant. It is only going to receive a money judgment, if it receives anything from you.

It is not going to have any part of the continuing participation or continuing operation of that plant. This is it for Prudential. This trial is all it's got.

Now, I want to close on a note which I think is typical of the arrogance that has been shown by Phillips throughout this entire lawsuit. They called an expert, Mr. Widmann, and he said, I forget about the figure, finders, $70,000. And he said, "It is in the nature of a tip," as though Prudential were a croupier or a dealer at a gambling place and Phillips had just won a pile of chips, so they give them a tip.

Well, we don't want a tip. We want our share, our share of that project, which our concepts helped to develop, and we want you to give it to us.

Thank you.

THE COURT: Members of the jury, there's been a little bit of talk by both of the lawyers about the length of time taken.

I will assure you that the Court controls the amount of time and I do not believe that anyone took an unreasonable amount of time and had I thought so, I would have stopped them.

Now, the next state in the trial is for me to give you my instructions as to the law and as to the procedures you will follow in deciding this case, in reaching your verdict and making your final judgment as to the facts.

You remember at the very beginning I told you that deciding facts is your job and a matter in which your judgments and your conclusions are supreme.

Now, my instructions do not take quite as long as the attorney's summation arguments, but almost as long. And for that reason, I am going to break for the day, and resume on Monday morning -- we'll check the time for you in ~~a~~ a minute.

At about noontime, the alternates, if you are not actually used, will be excused, because the actual verdict will be given only by a jury of six. So that if the alternates are not needed, they will be excused at or before noontime.

And then, at that time, you will go forward and deliberate and reach a verdict in this case.

Now, I want to caution you and ask you again:

I believe that the matters I will take up with you in my instructions are very important to assist you in doing justice in this case, so please, until you hear me, and until I give my speech, please keep an open mind. Please do not decide this case or jump to any conclusions or become firm in any opinion as to any matter. Keep an open mind.

Do not discuss the case, and I will resume with you on Monday morning.

I'm sorry to say the calendar has been sent upstairs to prepare the law journal entries for Monday and that's what it is not here.

(Pause.)

THE COURT: Is 10:30 convenient for you jurors?

THE JURY: It doesn't matter.

THE COURT: Let's make it 10:30 then, Monday morning, and may you all have a pleasant weekend.

(Jury left the courtroom.)

THE COURT: May I ask counsel or at least lead counsel to be here a little bit earlier on Monday so that I can review with you the format of the interrogatories for the jury, because we don't have our work completed on that. I'd like to be able to show that to you and get your comments or additions before we charge the jury.

MR. MacCRATE: I believe in addition, your Honor, that in the light of Mr. Farrell's summation, that I will have addition instructions to request of your Honor.

THE COURT: Without committing you to what they would be, could you give me a general suggestion of the area which you intend to request?

MR. MacCRATE: I think that some of the hyperbole of language of "vultures," of "stone-walling," of "cover-up" went far beyond the bounds of proper summation.

I think that talking about a quota as a license to steal, a quota that is issued by the government of the United States, this kind of rhetoric, has no place in a court of justice, I respectfully submit.

THE COURT: Well, if the totality of it is as you seem to feel, you really ought to take objection at the

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time.

But I think that the charge as I presently have it in mind, will focus the jury's attention on the ultimate merits and will move any of these suggestions from their mind, but you are free to submit any additional requests. Get them in as early as you can.

MR. MacCRATE: In addition to that, your Honor , I believe that the extensive discussion of what is the profitability, the discussion of years after, the only year for which any proof has been submitted and claimed as the time for fixing damages does create a very substantial problem of confusion in the jurors' minds as to when they should view these concepts for evaluation, and it is my recommendation that there is no current provision in the proposed instructions on this point.

THE COURT: All right. I will adhere to my prior direction. Bring them in as early as you can.

MR. MacCRATE: Yes, your HOnor.

THE COURT: Give them to your adversary. I will have to look at them.

All right, thank you, gentlemen. May you all have a pleasant weekend.

(Adjourned to Monday, January 26, 1976, at 10:30 a.m.)

PRUDENTIAL OIL CORPORATION

vs. 67 Civ. 3748

PHILLIPS PETROLEUM COMPANY

January 26, 1976
10:20 a.m.

- - -

(In open court - jury not present.)

THE COURT: Good morning, gentlemen.

The clerk has delivered to each of you a few minutes ago a proposed special interrogatories for the jury which the Court has prepared, taking what I consider to be the worst features of each submission that I have received from counsel.

If there are any grievances with this form, I'd like to hear them now.

MR. MacCRATE: Might we have just two or three minutes, your Honor? We were reviewing them.

THE COURT: Is there anything else you have? You said you were going to bring in something, Mr. MacCrate.

MR. MAcCRATE: I have submitted them through your clerk, your Honor.

THE COURT: That's all that you have, 30b, c and d?

MR. MacCRATE: Yes, your Honor.

THE COURT: Do you have anything additional?

MR. FARRELL: No, your Honor.

THE COURT: As soon as you're ready to be heard on these interrogatories -- are you ready to be heard, Mr. Farrell?

MR. FARRELL: I have no objection to them.

THE COURT: All right. Please notify the clerk as soon as you have finished studying them, Mr. MacCrate.

MR. MacCRATE: Thank you.

(Pause.)

THE COURT: All right, Mr. MacCrate, you may be heard with respect to the proposed special interrogatories

MR. MacCRATE: With respect to the proposed special interrogatory 1 and 2, I have no comment.

I understand that those relate to misappropriation.

With respect to 3, I would suggest the addition of the words "if any," after the word "concept" on the first line.

THE COURT: Well, I suppose that wouldn't do any harm. I suppose it is implicit that if there is no concept, there is nothing to be disclosed. But I have no objection to putting that in.

You know, there is no paper a lawyer can write that some other lawyer can't look at and emit a howl of rage.

MR. MacCRATE: I fully understand, but I'm not howling, your Honor. I'm trying to be --

THE COURT: I am accepting your suggestion. What else?

MR. MacCRATE: On the second line, there seems to be introduced a new notion.

THE COURT: Second of question 3?

MR. MacCRATE: Of question 3, with the words "or services." I respectfully submit that the presentation has been directed to concepts and ideas. The addition of "or services," broadens what has been placed before the jury.

THE COURT: I would think that in theory assembling the ideas is a service. That is the way it's been reasonsed by me in most of my work that I have done here.

I think in some of the requests to charge, particularly as to the implied contract in fact, we defined such a matter as including services. I suppose if you assemble a bunch of material into a brochure, that is a service.

MR. MacCRATE: To the extent that the concept has been incorporated into something, I would recognize that there would be a service element that preceded it, but to have services stand alone in the disjunctive in this fashion I suggest is --

THE COURT: Do you think it would be better if it said, "Ideas and/or services"?

MR. MacCRATE: Contribution of ideas or any services relating to their development.

THE COURT: What do you say about this, Mr. Farrell?

MR. FARRELL: Your Honor, I have no objection to the question as it stands, and I think you were correct when you said that the assemblage of this is in fact a service.

THE COURT: How is it you want to word it again, Mr. MacCrate?

MR. MacCRATE: If the service concept is in, I would suggest "ideas or the services in developing"--

THE COURT: I would simply say, "make a contribution as a result of a contract implied in fact," if that is satisfactory to both of you. That might obviate any difficulty.

MR. FARRELL: That would be satisfactory with me, your Honor.

MR. MacCRATE: That I think is even more sweeping, your Honor, unless the contribution is related to a contribution of ideas or services relating to the development of those ideas.

THE COURT: All right.

What else is there?

MR. MacCRATE: With respect to proposed interrogatory 4, which I understand to be the quasi-contract interrogatory, while the legally protected notion is not as broad, I think there are some aspects of the legally protected idea that are also present in a quasi-contract that the notion, not of novelty but of originality is present, and also that the idea be in a concrete form, and therefore, as your Honor proposes, just to charge or interrogate as to 4 plus 5, without some reference back to the legally protected notion, I believe would be error.

THE COURT: Whatwords do you want to insert in 4? I don't want to waste the time of the jury. I would say that I don't believe to support a quasi-contractual action that it has to be necessarily original. Someone could go pick the brains of Coan and Chapman and spend a couple of weeks in the library and develop some material which might be the object of a quasi-contractual claim.

Of course, the value of it would probably be trivial, but I think a valid claim could be made under an assumed state of facts. But I don't think we need to go into that now.

Give me your requests as to question 4 and I will attempt to rewrite it so there will be no claim of error on anyone's part.

MR. MacCRATE: "Did Phillips obtain a benefit from a contribution of ideas developed in a concrete and specific form, or from the services, or from any services of Prudential Connecticut rendered in developing such ideas, as a result of a breach of confidence, such that Phillips has been unjustly enriched?"

MR. FARRELL: Your Honor, I would object to that.

THE COURT: I would be willing to expand the use of the word "services" in question 4 to the same extent that I have done in question 3. I don't believe that I'm required to expand these interrogatories to encompass every single element or aspect of the jury instructions.

In presenting it to them I will tell them that they have to bear all the instructions in mind. But I will modify the word "services" in question 4, the same as I have in question 3 in accordance with your last recommendation.

All right, anything else?

MR. MacCRATE: Your Honor, I would also except to the phrase "or under the circumstances" which I submit is open ended; that what is alleged is a breach of confidence.

THE COURT: Well, you see, on this particular quasi-contractual theory I suppose even a conversion would be adequate to support the claim.

I will modify that to read "under such circumstances," and leave the "or" in. I don't want to suggest to them "other" because I agree that is rather sweeping.

But I think all of these matters are adequately covered in the charge.

The purpose of the interrogatories primarily is to protect everyone's interests, including the Court, so we will know how the jury got there. Ifyou all wanted to take a general verdict, I would probably permit it, but I gather you don't.

MR. MacCRATE: No, your Honor, we do want these special interrogatories.

In 5, I have the same objection to the phrase on the second line, "or any other contribution."

THE COURT: Suppose I modify that to say "contribution of ideas or services relating to the development of those ideas."

MR. MacCRATE: Yes, your Honor, that would accommodate it.

In addition, your Honor, we did submit

supplemental proposed instructions, supplementing 30b, to include the date as of --

THE COURT: I don't know where you get that day, and I think the date is an issue of fact for this jury to determine.

MR. MacCRATE: The date, your Honor, is the date of the import allocation by the Secretary of the Interior, and that is stipulated.

THE COURT: What do you say about that?

MR. FARRELL: I would object to that, your Honor.

THE COURT: What do you say is the correct date?

MR. FARRELL: The correct date for the value of the concepts?

THE COURT: Yes.

MR. FARRELL: As of the date that the experts testified, as of 1968.

THE COURT: You see, I could fashion a theory to support an August 7, 1963 date here.

MR. FARRELL: That's true too, your Honor.

ME. MacCRATE: I believe, your Honor, it is the question of the misappropriation against the unjust enrichment. This relates to unjust enrichment.

THE COURT: The tort was committed the date that they took it, isn't that so? And the date that they took it could reasonably be fixed by the date on which Mr. Conn handed the papers to Mr. Waldby, the brochure rather, and said to him, "Let's treat this as confidential. Brother Chapman just gave it to me."

If you remember that testimony.

MR. MacCRATE: I do, indeed, your Honor.

THE COURT: And that a jury could infer from that that at that particular point in time, responsible people in Phillips had taken possession of this concept in the form of this brochure and intended to use it.

MR. MacCRATE: I think with respect to the implied contract, that is the appropriate time, some time in 1963. It might be earlier when Mr. Shippee disclosed the material.

THE COURT: Well, they hadn't done anything, even arguably, to show an intention to use it until that particular day or rather they hadn't done anything to show an intention to use it in contravention of Prudential's rights.

MR. MacCRATE: But it was the date it was made known.

THE COURT: I know that, but there was no breach of the confidence until the conversation between Conn and Waldby. I don't see any basis earlier than that for any breach.

I steal your shotgun but the hunting season doesn't open until July. That's what happened here, if you want to analogize it.

MR. MacCRATE: But if I--

THE COURT: The date of taking is the date of the tort.

MR. MacCRATE: But the date that the information is disclosed to the defendant is the date from which the defendant has the use of the material.

THE COURT: But he didn't do anything, looking at it most favorably to the plaintiff, he didn't do anything wrong with it, defendant didn't, until that moment where the conversation between Conn and Waldby occurred.

MR. MacCRATE: Certainly from the date that it was placed in the defendant's possession it was subject to the control of the defendant from that time forward.

THE COURT: Until he yields to temptation there is no tort.

I propose to leave the date to the jury as an issue of fact. If you want the date included in the interrogatories, that is something you might consider. But I think that the misappropriation, if I had to decide it, I'd say the misappropriation occurred on August 7, 1963.

MR. MacCRATE: Your Honor, I think we are perhaps eliding the concepts. We are not talking about -- I was not seeking to speak of the tort, misappropriation, I was speaking about the unjust enrichment, and from that point of view, establishing the time at which, and the circumstances at which, any unjust enrichment is to be measured I think is appropriate --

THE COURT: Unjust enrichment I view only as a measure of damages. The basis for the recovery occurs when someone acts, and the act they do is that they take advantage or possession of somebody else's property, under circumstances under which the law requires restitution or imposes liability for damages.

MR. MacCRATE: And these supplemental suggestions, your Honor, are directed solely to the question of damages.

THE COURT: If you want an interrogatory fixing the date, I would consider an application for such an additional interrogatory. I really believe the date is a fact issue for the jury, and my instructions leave that issue with them. But I must say, if I had to decide it myself, I would think that, if you believe the testimony as tendered, that the date has to be the date of the initial wrongdoing, which is probably August 7, 1963.

The fact that it took them a while to realize anything from it is a different question.

MR. MacCRATE: And your Honor's ruling is that that would be applicable both with respect to misappropriation and with respect to unjust enrichment?

THE COURT: That is only my opinion. The ruling I have made is to submit the date to the jury for their consideration. If you want to smoke out what date they use, then you can propose an additional interrogatory to cover that issue, and you may suggest to me what you consider to be the proper date, and I will take the same suggestion from Mr. Farrell and leave it up to them. Later on, if you can support a conclusion that it is wrong, you will have whatever remedies are available to you.

MR. MacCRATE: We will draft such an additional special interrogatory, your Honor.

THE COURT: All right. Somebody will have to do it, because I'm starting right now.

MR. MARKS: On that point, your Honor, you denied our request number 10 which was a request for the date of breach, and I thought that matter had already been determined. But in the event that your Honor wants to reopen that, we would request that you give them a charge on the date of breach.

THE COURT: What do you say is the date of breach?

MR. MARKS: August 7, 1963.

Request number 10.

I thought we had already resolved this matter.

THE COURT: I regard it as a fact issue, but I think if they believed the testimony, it would have to be August 7, 1963. I think it's best to leave it with the jury. I want to tell you, while we're here, that our alternate number one, Mr. Agostino, has called in ill. Fortunately our regular duty are all present.

Yes, Mr. MacCrate?

MR. MacCRATE: With respect to 30c and d, we would request instructions in regard, in calculating the value, that the jury may not take into account the value, if any, of concepts developed by others than Messrs. Shippee, Willey and Young.

THE COURT: I have already agreed to charge that and I will so charge.

MR. MacCRATE: With respect to 30-D, it is the value of the concepts which the jury is to determine and not the value of Phillips Puerto Rican facility or of the profits.

THE COURT: I think I already covered that adequately in my prior conference with counsel.

MR. MacCRATE: Finally there are several housekeeping details with respect to exhibts that we wish to make.

THE COURT: All right. I thought you were going to work something out with the clerk but I will hear them.

MR. FARRELL: There are three exhibits which were received in evidence and the clerk has not marked them as received. Those are P-95 received on page 254; P-211 which was received on page 288; and P-214-F which was received on page 869.

Also, your Honor, we have two exhibits, P-214-E, one of which should be G and the one that should be G is the page of 214 entitled "Officers and Directors Puerto Rico Oil."

THE COURT: Hand it up to the clerk and he will physically correct it.

Does that take care of your problem with respect to exhibits, Mr. Farrell?

MR. FARRELL: Yes.

THE COURT: Mr. MacCrate, what do you have about exhibits?

MR. MacCRATE: We would ask that D-216 be marked in evidence which relates to a matter as to which there was testimony about which I am confident --

MR. FARRELL: No objection.

THE COURT: Received in evidence.

MR. MacCRATE: And Interrogatory 27 which was read and referred to a document that we find was inadvertently not marked in evidence.

THE COURT: Is it attached to the original interrogatories that are on file with the Court?

MR. RIGNEY: I believe it is.

THE COURT: Mr. MacCrate, if you want to mark it you may but anything in the docket is part of the record.

MR. MacCRATE: We for the purposes of clarity would request that the interrogatory be 393 and the exhibit which reference is made be marked 241 in evidence.

MR. RIGNEY: And 342.

MR. MacCRATE: I said --

MR. FARRELL: 342 was objected to and excluded.

THE COURT: Hand it to the clerk, please.

MR. FARRELL: That was the page which your Honor asked Mr. MacCrate to take off before he would acccept what is now being offered as 341. That was the bill, your Honor, that was attached to that cover page in the brochure, Exhibit 215.

THE COURT: The only reason for taking it off was that it was not properly part of the document when originally brought into existence.

MR. FARRELL: Precisely.

THE COURT: D-342 is received or is there something else already in evidence?

MR. MacCRATE: It was found, your Honor, in the Prudential files with 341.

THE COURT: If I have ruled on it I will not change my ruling.

MR. MacCRATE: I think that the record is clear however that that is what they had printed under that bill. There is oral testimony to that effect.

I would ask that D-343 and 341 be received in evidence.

MR. FARRELL: I thought 341 was already received.

THE COURT: If it is not it will be.

MR. FARRELL: I have no objection to the interrogatory.

MR. RIGNEY: If I may, one final matter.

On Thursday I introduced three interrogatories which you asked to be designated with new numbers. They would be D-344, 345 and 346.

THE COURT: Yes, received in evidence so that if the jury calls for them they will not have the problem of redacting them.

MR. RIGNEY: We have gone over Court Exhibit 2 which was the stipulated facts to include all of the joint exhibit numbers which have been used at this trial and I would propose that this be included with the appropriate set of documents so that the jury could have a ready reference to the documents.

THE COURT: I think I marked in pencil on the original exhibit but it may be included and substituted for Court Exhibit 2.

All of you put your exhibits together so that if there is any question of submitting it to the jury there will be no question of what goes into the jury room.

I don't mean in one pile but make two separate piles of those admitted in evidence and sponsored by yourselves.

MR. MacCRATE: One final matter, your Honor.

In view of the fixing on a date of August 7, 1963 --

THE COURT: I didn't fix on a date. All I gave was my opinion. I was going to leave it to the jury to fix the date.

MR. MacCRATE: I understood that it is now plaintiff's position that that is the date of the wrongdoing and that has not heretofore been the position of the plaintiff as I understand it and I would ask leave to interpose the defense of the statute of limitations based on a claimed wrongdoing as of that date.

I believe it would be barred by the four-year statute of limitations since this action was not commenced until September 27, 1967.

MR. FARRELL: I object to that. That would be an affirmative defense and, besides, it is a question for the jury. The wrongdoing continued on as long as they used that brochure. That was the first hostile act, not the last. It was concealed throughout the entire time.

THE COURT: There would be a six-year statute on some of these claims. The New York statute of limitations?

MR. MacCRATE: It would clearly have to be a diversity action.

THE COURT: New York statute of limitations on contract implied in fact?

MR. MacCRATE: With respect to a tort claim, your Honor, I believe it would be four years.

THE COURT: Well, I suppose it would be four years from when they discovered the tort.

MR. MacCRATE: In the case of an intentional tort I believe the period is shorter than that.

THE COURT: Let us try and clarify it for the record.

Are you electing the August 7, 1963 date?

MR. FARRELL: No, I am not. I am saying --

THE COURT: I think you ought to elect the date although I expect to leave the date for the jury.

MR. FARRELL: Well, your Honor, my problem is this:

It is clear to me that August 7th date that you mentioned was the first time that Phillips had actually done something in contemplation of appropriating our idea. However, it continued over a period of many years.

So I would elect that date by saying that is the earliest date from which the tort could be determined but certainly not the latest date because there were continued revisions of the draft and indeed copies were not made until January of 1964 and other things after that.

THE COURT: Another difficulty with the unjst enrichment claim, you don't have any damages until the defendant is unjustly enriched. I suppose they were not unjustly enriched until they began pumping petrochemicals through the refinery.

MR. MacCRATE: The position taken by the plaintiff has been that the unjust enrichment is getting a quota, your Honor.

THE COURT: A quota bein non-transferable it had no value, did it?

MR. MacCRATE: That is our submission, it had no value.

THE COURT: It became unjustly enriched the first time they made a sale from the core refinery and I believe that was in 1968, was it?

MR. MacCRATE: It went on stream in 1968 after preliminary tests in late 1967 but I would submit, your Honor, that what the whole thrust of plaintiff's position has been is the getting of the oil import allocation.

2 THE COURT: You are not unjustly enriched until you make some money from it and since it was a non-transferable quota it was of no value until the refinery

was completed.

MR. MacCRATE: But restricted stock is not transferable and yet it has value, your Honor.

THE COURT: I don't know of any restricted stock that is totally non-transferable. I will leave that for the jury and see if we get a verdict. If you want to submit a question to go at the end of the interrogatories write it out and I will attempt to deal with it.

MR. MacCRATE: Thank you, your Honor.

THE COURT: Bring in the jury.

(Jury present.)

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THE COURT: Good morning, members of the jury.

We have now reached that point in the trial where you are about to enter upon your final function as jurors which is, as you know and you all appreciate, one of the more important duties of citizenship in this country.

I know that each of you has given very careful consideration and attention to the evidence in this case during the time we have been together here. I am sure you will approach your final deliberations in that same fine spirit which you have so far displayed and that you will act in fairness and impartiality and reach a just verdict.

As I mentioned to you at the beginning of the trial, in our court system the function of the judge in the case and the function of the jury are separate. You are not lawyers. It is my duty as judge to instruct you as to what the law and it is your duty to accept the law as stated to you and then to determine the facts from the evidence, whether the plaintiff has sustained its burden of proof as to the claim made here.

Just as I am the exclusive judge of the law, so you the members of the jury are the exclusive judges of the facts. You and you alone determine the weight, the effect and the value of the evidence, and the credibility or truthfulness of the witnesses. On that basis you will resolve the issues in this case.

This case should be considered and decided by you as a dispute or action arising between persons of equal standing in the community, equal worth, holding the same or similar stations in life.

The corporation is entitled to the same fair trial at your hands as a private individual would receive and treat these two corporations the same as if they were persons. All persons, including corporations, are equals before the law. They are to be dealt with equally in a court of justice.

A corporation is an artificial person which acts and does business only through its agents, officers, directors and employees. It is to be treated by you as a single entity. Communication to or knowledge of any fact by the agent, employee, officer or director of a corporation will be considered by the jury as knowledge or communication to the corporation, if such knowledge or communication was received by the agent, employee, officer or director in the course of his employment or within the scope of his duties.

It is not necessary that there be a formal contract to create such an agency relationship, and it is sufficient to form an agency relationship if a party consents to have another act in its behalf.

In the course of your deliberations you may have to consider whether Mr. Anderson or others were agents of Phillips. In the course of these instructions, if I make any reference to any evidence which does not agree with your recollection, you are to disregard that because it is your recollection of the evidence that governs and not anything said by me or by the lawyers in their opening statements or in their summations or during a trial or in the form of a question which controls.

(Continued on next page.)

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The attorneys have the right and duty to press the legal theories they hold. They are simply performing their duty here during this trial.

Any evidence as to which an objection was sustained by the Court and any answer ordered stricken out by the Court, must be disregarded in its entirety. Put out ofyour mind any exchanges which may have occurred during the trial between the attorneys or between any attorney and the Court because I don't favor one side or the other or criticize anybody, and I don't wish to indicate to you that I have any opinion as to the truthfulness of any witness or as to the merits of the case. That is your function. It is yours alone, and I leave it entirely to you.

So do not assume from anything that I may say that I hold any opinion as to any matter concerning the issues before you. And please don't reach any opinion that I may have any attitude or that I may tend to favor any particular result in this case, because I do not.

This is not a contest between the lawyers. It is a case between the parties. It is to be decided by you according to the merits and according to where the truth and justice lie.

I ask you to concentrate on the merits of the

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controversy and to put all other things aside. Use your common sense and be fair.

One word more I'd like to say about this aspect of the trial:

In the course of doing their duty many attorneys do engage in strong language or perhaps inject their personal opinion inadvertently into a case and I have to admit that many of us enjoy listening to that kind of discussion. But as I just mentioned, this is not a contest between the attorneys and you should put out of your mind any words or suggestions made in argument, unless you consider that they relate directly to the issues which are before you for decision.

Particularly, one of the attorneys referred to the obtaining of an oil import quota from the bureaucrats in Washington as being similar to having a "license to steal."

Well, whether you regard that as true or not, it has nothing to do with this lawsuit, and the only purpose of that statement was to suggest to you that having an oil import quota, even one with restrictions, is something that has value. If it was a license to steal, the licensing was being done by the federal government and not by Phillips or Prudential. And if you think there is anything wrong about

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it, you have to blame the politicians and the people who elected them, you and me, and not the parties to this lawsuit, Prudential or Phillips.

Some other strong language was used, too. I remember the word "vultures." Well, the purpose of this jury is to do justice between the parties, and not to punish anybody. So even if you think that somebody was a vulture, and I don't suggest that he was, that that type of argument has no significance in this lawsuit. So while you might all enjoy hearing it, I do instruct you that you must put it out of your mind when you come to get down to the brass tacks of this case.

In talking with you I will refer to the issue of damages, and you are not to consider any instruction that I may give you with respect to damages as indicating that the plaintiff should recover damages or indicating in what amount plaintiff should recover damages.

This is a civil case and in a civil case the plaintiff has the burden of proof to establish all of the elements of its case to your satisfaction by a preponderance of the credible evidence.

A preponderance of the credible evidence in the case means such evidence as when considered and compared with what is opposed to it has more convincing force and produces in your mind the belief of what is sought to be proved is more likely than not true.

It is often said that the evidence is to be weighed on scales, and if you find the evidence on any issue of fact weighs equally in favor of the plaintiff and the defendant, that is, that the scales are evenly balanced, then the plaintiff would have failed in its burden of proving the case as to that item by a fair preponderance of the evidence, and it cannot recover.

However, if the scales tip, however slightly, in the favor of the plaintiff, that would constitute a preponderance of the credible evidence, and it would have satisfied the legal burden of proof imposed upon it.

A preponderance of the credible evidence does not mean the greater number of witnesses or the greater length of time taken or the greater number of documents introduced by either side. It refers to the quality of the evidence, as you regard it, the weight, the significance, and the effect that the evidence has on your mind.

Some of you may have served on criminal trials as jurors or you may have watched the television and perhaps you have heard the expression, "proof beyond a reasonable dobut." Members of the jury, that is the level of evidence which society requires in order to obtain a criminal conviction, and that rule does not apply to civil cases.

Here, in a civil case, the test as to whether a party has discharged the burden of proof is based upon a preponderance of the credible evidence.

Now, for your guidance in considering the evidence you have heard, I must tell you there are two classes of evidence recognized and admitted in courts of justice. One is called direct evidence, and the other is called circumstantial evidence.

Direct evidence tends to show the fact in issue without any need for any other amplification; although of course there is always the question as to whether it is to be believed.

Circumstantial evidence is evidence that tends to show facts from which the fact in issue may reasonably be inferred. It is evidence which tends to prove the fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer or conclude that the facts sought to be established are true.

There is a traditional illustration. Let's assume we are sitting in one of the courtrooms in the upper part of this building, far above the street, and sometimes it is difficult when you look outside the window to tell whether it is raining outside or not. However, if you look out the window and you see that down in the street the people are walking along with their umbrellas, you would usually come to the conclusion that it must be raining. You have had direct evidence; the evidence of your own eyes which tell you that the umbrellas are up, and that fact constitutes circumstantial evidence from which you are entitled to conclude that it must be raining.

In other words, circumstantial evidence consists of facts proved from which the jury may infer by a process of reasoning other facts which are in issue.

And circumstantial evidence, if believed, is of no less value than direct evidence.

Now, in determining what evidence you will accept, you must make your own evaluation of the testimony given by each of the witnesses and determine what you believe to be the truth and the degree of weight you choose to give to that testimony.

The testimony of any witness may fail to conform to the facts as they occurred, because the witness is intentionally telling a falsehood or because the witness did not accurately see or hear what he testified about or because his memory, his recollection of the event is faulty, or perhaps because he hasn't expressed himself clearly in giving his testimony.

There is no magic formula by which you can evaluate testimony. Each of you bring to this courtroom today all of the experience and background of your lives. In your every day affairs each of y ou determines for himself the reliability of statements made to you by other people. The same tests you use in your every day dealings are the tests that you apply in your jury deliberations.

You may, of course, consider the interest or lack of interest of any witness in the outcome of this case. A witness who is interested in the outcome of a case is not necessarily unworthy of belief. The interest of a witness, however, is a factor or a possible motive which you may consider in determining the weight and credibility to be given to his testimony.

In doing this, you may also consider whether the testimony of a witness is corroborated or borne out by the testimony of others or by documents, exhibits that are in evidence.

You may also consider the bais or favor of a witness, if there be any, and observe the manner in which the witness gives his testimony on the stand, the appearance and conduct of the witness in giving his testimony.

You may consider the opportunity the witness had to observe the facts soncerning which he testifies and the probability or improbability of the testimony in the light of all other events in the case.

You may also consider whether a witness had any motive to lie. These are all items to be taken into your consideration in determining the truthfulness and weight, if any, that you will assign to a witness' testimony.

If such considerations make it appear that there is a discrepancy in the evidence, you will have to consider whether this can be reconciled by fitting together the conflicting evidence, and if that is not possible, then you will have to determine which of the two conflicting versions you will accept.

Now, a witness may be interested in the outcome of this case by reason of his ownership, interest in or employment by a corporation which is a party to this suit. In addition to stock ownership or employment, you may consider the fact that a witness has a continuing agreement with either corporation to provide services and receive a fee as indicating that he has some interest.

There has been some evidence that certain witnesses, notably Mr. Willey and Mr. Young, and possibly others, have an agreement whereby they will receive a portion of whatever recovery Prudential would receive if it prevails in this case. This evidence, if believed, would indicate that they each have an interest in the outcome of this litigation. But before leaving this subject, I wish to emphasize that merely because a witness has an interest in the outcome of this litigation does not render him unworthy of your belief.

You may, however, consider this interest as one factor among others in determining what weight and credibility to attach to his testimony.

Now, I will say a word about the testimony read to you from depositions and interrogatories.

During the trial of this case both sides have read to you testimony given by way of depositions or interrogatories prior to trial, where a witness is questioned by the lawyers out of court, either orally or in writing, and swears to the truth of his testimony before a notary public. This procedure is perfectly permissible, it is authorized to save the time of the Court and jury. And the reading of this testimony to you in the course of this trial is perfectly proper.

Testimony given to you as evidence in chief by way of reading a deposition or interrogatories is entitled to the same consideration on your part as if the witness had been present and had testified from the witness stand, and you are to weigh that evidence and treat it in the same manner as if it were live testimony.

There is another aspect concerning the use of depositions and interrogatories at trial. When a witness testifies at a trial he may be confronted with the testimony that he's given on a prior occasion by deposition or at trial in this or another case. Rule 32 of the FEderal Rules of Civil Procedure, which apply in this court, provides in part:

"Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness."

Testimony is said to be impeached when it has been rendered unworthy of belief.

In judging the credibility of a witness, you may consider whether that witness testifiedin a different or contradictory way in connection with his sworn testimony given on another occasion. Simply because a witness testified differently at a prior time does not automatically mean that he was lying at this trial or that his testimony in this case should be totaly disregarded by you. Instead, you are to consider the nature and extent of the apparent contradiction, if there be one, and you are also to consider any excuse or explanation given by the witness as to why or whether he testified inconsistently on a prior occasion.

You may also consider whether or not the prior testimony was given recently or whether it was given closer in time to the events in question; whether the witness had an interest in testifying differently here than he did on the prior occasion; when that interest perhaps was not affected or was affected differently.

After considering all of the surrounding circumstances, it is for you the jury to determine whether theprior testimony doesin fact discredit, contradict or impeach the testimony given on the trial here.

In this aspect of this lawsuit, as in all matters concerning truthfulness and credibility or the weight which is to be given to evidence, it is for you and you alone to decide, using your common sense and considering all of the factors previously mentioned, what the weight, significance or credibility is that you should attach to that testimony.

Now, when a witness who is a party to the case or has some interest in its outcome admits some fact or facts against his interest by a statement, in or out of court, or by other conduct or by testimony then such statment or other conduct or testimony, if knowingly made or done, may be considered as evidence of the truth of the fact or facts so admitted as well as being used by you for the purpose of judging the truthfulness or credibility of the witness.

Now, admissions of a party are among the most effectual proofs in law. They constitute the strongest sort of evidence against a party making the admission of the facts stated in the admission. You are entitled to give weight to the admissions of witnesses who were officers and agents of the parties to this case, whether made on the stand while testifying before you or in a deposition prior to trial or in a conversation with a witness whose version of the conversation you believe, if you find that the admission was knowingly and voluntarily made.

In addition, if you find that any witness has knowingly testified falsely at this trial as to any material fact, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who knowingly testifies falsely about one material fact is quite likely to testify falsely about everything.

You are not required, however, to consider such a witness as totally unworthy of belief. You may, if you choose, accept so much of his testimony as you believe to be true and disregard that which you believe is false. By the processes which I have just described to you, as the sole judges of the fact, determine which of the witnesses you will believe, whatportion of their testimony you accept, and what weight you will give to it.

Now, an act or omission is knowingly done if it is done voluntarily and intentionally and not because of an accident or mistake or some innocent reason.

Now a word about Plaintiff's Exhibit 224, which is a set of four charts that was received in evidence earlier in the trial.

This exhibit itself is not independent proof. It is merely offered as a visual representation of the other exhibits which are in evidence as Plaintiff's Exhibit 215 and Joint Exhibit 45. If information contained in exhibits or testimony is converted into visual form and the chart or summary is marked as an exhibit, that chart or summary does not have any independent value as proof because it is only based upon the testimony or other exhibits. It is a visual aid, just to help you understand what is in the exhibit.

The charts do not claim to deal with the entire subject matter of the two exhibits which they purport to summarize. The evidence before you is in the underlying exhibits, and I encourage you to examine those documents and not to rely merely on visual aids which are available for your convenience, but you can place no greater value on the visual aids or charts than you would on the underlying exhibits.

Now members of the jury, you will recall that

Mr. Rosenthal, Mr. Walker, Mr. Moore, Mr. Widmann and some others all gave testimony concerning their qualifications and experience in their respective fields of finance, business or engineering or the oil business. When a case involves a matter of science or art requiring special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the information of the Court and jury.

The opinions stated by each expert who testified before you were based on particular facts as the expert himself observed them and testified to them before you or as they appeared in business records of financial statements or as the attorney who questioned him asked him to assume in reaching his opinion.

Now, you may reject an expert's opinion if you find the underlying facts to be different from those which formed the basis for the opinion.

You should consider each expert opinion received in evidence inthis case and give it such weight as you may think it deserves.

If you should decide that the opinion of an expert is not based upon sufficient skill, learning or experience in the area in which he is testifying to justify regarding him as an expert, then you must disregard his opinion entirely.

You may also reject an expert's opinion if after careful consideration of all the evidence in the case, expert and other's testimony, you disagree with the opinion.

In this case you have heard expert testimony on the valuation of the concept which Prudential claims it conceived for a petrochemical core plant in Puerto Rico. You are not required to accept the experts' opinions as to this matter or as to any other issue in the case, to the exclusion of the facts and circumstances disclosed by other testimony which you find credible.

Such an opinion of an expert is subject to the same rules concerning reliability as the testimony of any other witness. It is given to assist you in reaching a proper conclusion, and is entitled to such weight as you consider it is entitled. It must be considered by you, but the experts' sopinion is not controlling upon your judgment and you remain free to use your common sense.

Now I have covered some general rules relating to the function of the jury and to the nature of proof and so forth, and I'm now going to turn to this particular case.

Now, the plaintiff in this case, as you know, is Prudential Oil Corporation, and the defendant is Phillips

Petroleum Company. The plaintiff contends that through the efforts of its officers and agents, Mr. Shippee, Mr. Willey and Mr. Young, that Prudential Oil Corporation, a Connecticut corporation, which I will sometimes refer to as Prudential Connecticut for convenience, possessed a legally protected business concept relating to the development of a petrochemical core facility to be built in Puerto Rico. The parties agree that for any petrochemical facility in Puerto Rico to be feasible in the early 1960s, it was necessary for its operators to procure foreign oil. To be permitted to import foreign oil, the operator of the facility would have to be allocated or granted a quota by the United States Department of the Interior, Oil Import Board.

Plaintiff contends that Phillips, using the concept which Prudential developed and disclosed to Phillips, was able to procure the necessary oil import quota and develop a petrochemical core facility in Puerto Rico along the lines of the Prudential concept.

Prudential relies upon several distinct theories upon which it contends Phillips is liable. In a moment I will discuss each of these theories with you.

Phillips denies that it has any liability on any of these theories.

Now, there are certain elements which will be of concern to you under one theory, but not under another, and therefore, it is important for you to keep the separate theories distinct in your minds.

There are certain fact issues which you will have to resolve, which are common to all of the theories. The theories being asserted by the plaintiff are cumulative, and a questionnaire or a special form of verdict will be submitted to you for the purpose of answering the questions posed by the different theories which are being presented. And when I finish my instructions, I will put copies of that questionnaire in your hands and we will go over the questions.

Now, plaintiff's first theory is based on a claimed tortious misappropriation of a legally protected business concept. A tort is an intentional wrong. Something is said to be tortious when it involves an intentional wrong to the person or property of another person or corporation.

For Phillips to be liable to Prudential under plaintiff's theory of the misappropriation of a legally protected business concept, plaintiff, Prudential, must prove to your satisfaction by a preponderance of the credible evidence, each of the following four elements:

Now, I'm about to read the four elements of a claim of misappropriation:

1. That Prudential Connecticut received, formulated or developed a concept or material.

2. That the concept or material conceived, formulated or developed by Prudential was legally protected.

3. That plaintiffs legally protected concept or material was used by defendant.

4. That defendant's use of plaintiff's legally protected concept or material was in breach of a confidence imposed in defendant by plaintiff or resulted from some misrepresentation made by defendant to plaintiff.

I will take up the first element first.

The first element requires that the plaintiff have conceived or developed a concept. Prudential claims that its officers and agents, Mr. Shippee, Mr. Willey and Mr. Young, conceived a legally protected business concept relating to the developement of a petrochemical facility to be built in Puerto Rico. The concept which Prudential claims to have possessed is said to have embraced four ideas:

First, that the facility be designed in such a manner as to produce a maximum of petrochemicals and be sufficiently flexible in it operation so as to be able to reduce the amount of fuels produced and increase the amount of petrochemicals produced as demand for petrochemicals on the island of Puerto Rico increased.

Second, that the feedstreams or output of the petrochemical project, other than fuel, be encouraged to be kept in Puerto Rico, through a concept which has been referred to as a "quasi-public utility" or right of first refusal by which Puerto Rican petrochemical users would have had a first call upon the production of this plant at a reasonable price.

Third, that the promoters or originators of this core petrochemical facility promote and induce further investment in satellite plants that would utilize the feed streams from the petrochemical facility;

And, last, that as a consequence of these other ideas it would not be necessary in advance of construction of a core plant to obtain any contract with a major chemical company to purchase the petrochemicals to be produced at this facility.

Members of the jury, a legally protected business concept may be viewed as a form of property. As such its owner is entitled to its protection.

Phillips contends there is evidence in the case that the concept which Prudential claims to have conceived was in fact conceived in whole or in substantial part by persons not affiliated with Prudential. Prudential was not the first party to conceive of the idea of a third oil or petrochemical facility for Puerto Rico. The evidence shows that the Government of Puerto Rico through the so-called Economic Development Administration and other promotional groups had been involved before Prudential claims to have shown interest or developed what it claims here as its concept.

Plaintiff contends that it knew of the prior attempts by promoting groups but claims that its idea differed from the unsuccessful ideas of previous groups and, indeed, that its ideas were designed to overcome difficulties that the prior groups had encountered which had caused them to fail.

The issue for you to determine here is whether Prudential, acting through Shippee, Willey or Young, conceived of the ideas they claim. If you find their concept was not conceived by Shippee, Willey or Young, but rather the product of the efforts of Chapman, Coan, Brown or others, or people employed by the Economic Development Administration of Puerto Rico, then Prudential would not be the party to whom the concept belongs and would not be entitled to seek damages for its use or misappropriation.

If you find that Prudential did conceive of an original concept for developing a petrochemical core facility in Puerto Rico, you will then determine whether that concept is legally protected.

Members of the jury, there is no precise yardstick to define a legally protected business concept and I cannot tell you whether this concept if in fact it was developed by Prudential, rises to the status of a legally protected business concept.

This is a question of fact which you the jury will decide based on all the evidence in the case and using your own common sense and human experience. Not every idea or notion or plan which somebody has rises to the level of a legally protected business concept.

A simple one-shot suggestion to a businessman like why don't you have a sale or why don't you cut prices this week or why don't you paint the front door red or why don't you strike a match and have a fire sale, those would not be legally protected business concepts.

A legally protected business concept consists of a plan, an idea or a compilation of information which may be used in one's business and which gives a person a business opportunity or competitive advantage over another.

The concept must be an idea for continuous use in the operation of a business and to qualify for legal protection under this theory, the concept must be original. I have already discussed with you the requirement that the concept must be Prudential's and that again is applicable here.

The idea must be original although not in the sense that it is novel or in the sense that it was sufficiently imaginative to qualify for protection as an invention under the patent laws. That is not necessary.

The requirement of originality may be satisfied

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even if some or all of the elements of the concept were known generally or known to persons in the industry if the joining of the ideas together was original. The ideas will still be original if after its discovery persons in the industry believed it to be obvious based on what was previously known.

Likewise, the idea would still be original although persons other than Shippee, Willey and Young were capable of conceiving it. It is for you to decide whether the concept claimed was original.

Another element for your consideration in determining whether the concept was legally protected is whether the concept was secret. The originator of the concept does not relinquish its secrecy by disclosing it to other parties under circumstances in which it believes the other parties will treat it as a matter of confidence.

You should consider the extent to which this information was known to persons outside Prudential and also the extent of measures taken by Prudential to guard the secrecy of the information, as well as the value of the information to Prudential and to anyone interested in developing a petrochemical core facility in Puerto Rico.

Another factor is the amount of time, effort or money expended by Prudential or its officers or agents in developing this concept, as well as the ease or difficulty with which the information could be lawfully acquired or independently developed by others.

The concept must rise to such a level as to be sufficiently unique or important to the success of a venture so that reasonable people, contracting with each other in fairness and at arm's length, would expect to and would pay money to obtain the benefit of the concept.

A concept which is so simple or basic or so usual, so generally known and commonplace as to lack that value ordinarily associated with ownership of property, will not be a legally protected concept on the plaintiff's first theory.

However, a concept which is in that classification of idea for which reasonable businessmen would expect to pay and receive money for the disclosure of the concept, will rise to this level.

To be a legally protected business concept, the concept must be reduced to some tangible form. It is not enough if what was expressed to defendant, if anything, was vague, uncertain and undeveloped.

2 Plaintiff contends that the idea was in tangible form and is expressed in Plaintiff's Exhibits 214 and 215, the brochures that Prudential claims were delivered to

Phillips.

Phillips contends that the plaintiff's ideas were not developed in a concrete way, that the brochures were expressed in a vague and indefinite way, not susceptible of specific understanding or use and, in any event, were not original with Shippee, Willey or Young.

Now, for plaintiff to recover it is necessary, of course, that it prove the defendant used or appropriated the concept. If the idea actually used by defendant differed from and is not suggested by or derived from any concept conceived, formulated or developed by Prudential, then you must find for the defendant on this thoery for there has been no misappropriation.

Therefore, you must determine whether Phillips used plaintiff's concept in the petrochemical core facility that was ultimately built in Puerto Rico or in presentations made to the Economic Development Administration of Puerto Rico, or in the application to the Oil Import Board of the Department of the Interior to obtain the necessary oil import quota.

Prudential claims that it prepared the brochure, Plaintiff's 215 and supplied it to Phillips and thereafter Phillips prepared a brochure, Joint Exhibit 45, which it is claimed copied verbatim sentences or ideas from the

Prudential brochure, that this is some evidence of Phillips' use of the Prudential concept.

But the question of its use must be considered and determined by you based on the entire trial record before you.

In order to find that Phillips used Prudential's concept, it is not necessary that you find that Phillips used Prudential's precise words in any document which it thereafter called its own. If you find that the defendant made some use of Prudential's concept, you must then determine whether that use was substantial. There is no requirement in the law that the defendant use it exactly in the form in which it was received. Defendant may be liable for misappropriation even if it uses the concept with modifications or improvements created by its own efforts.

ifferences in detail do not preclude liability if substantially the idea used by defendant is derived from plaintiff's legally protected concept.

If the contribution by plaintiff's legally protected concept is so slight that defendant's idea could be said to be derived from other sources, then the defendant is not liable to plaintiff on this theory.

If you find that the defendant did use Prudential

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Connecticut's concept in part and in changed form but not so much as to create an entirely new project, that would be sufficient evidence of misappropriation. The extent of modifications or improvements made by defendant upon plaintiff's legally protected concept would affect the computation of damages or profits to which it is liable to plaintiff as I will later instruct you.

Now, the final or fourth element of the theory of misappropriation which must be proved if plaintiff is to recover on this first theory is that Phillips obtained and used Prudential's legally protected business concept in breach of a confidence.

The law does not absolutely forbid ones who are told about another legally protected business concept form using it. One circumstance under which the defendant would be liable for using the legally protected concept is if it was disclosed to Phillips under circumstances of a confidential relationship. If companies are dealing with each other at arm's length, each seeking for itself the best advantage to be derived from a transaction, they do not normally have a confidential relationship. However a party evaluating the proposal or the worth of a particular business transaction or considering a proposition offered to it by another party, often requires certain information in order to be able to decide if it is interested in entering into a deal.

If Prudential disclosed a legally protected business concept to Phillips not intending that Phillips make use of the idea but rather that Phillips consider its suggestion for Phillips to enter into an agreement with Prudential for the development of the concept to the benefit of both companies, then the ordinary arm's length business relationship would be transformed into a confidential relationship imposing on Phillips the obligation not to use the concept which had been disclosed to it without permission.

A confidential relationship may be created by the conduct of the parties toward one another without any express agreement in words. There has been some evidence in the case that Prudential disclosed its business concept to Robert Anderson who at the time of the disclosure was under retainer agreement to provide Phillips with idea for business ventures which might be of interest to it.

Prudential contends that Anderson informed Phillips' management of the idea and thereafter Phillips agreed to counsel and assist Prudential in the development of the concept. Prudential further contends therafter Shippee, Willey and Young, on behalf of Prudential, met with

Fischbeck and others affiliated with Phillips, and disclosed all of their ideas, including Prudential's formulation of its concept in its brochures.

Defendant denies that any confidential relationship existed between it and Prudential and contends that Prudential voluntarily offered Phillips its project plans in an effort to gain Phillips' assistance in connection with certain technical matters.

Those are the issues which you will resolve in connection with the first claim or the first theory urged by the plaintiff in this case. I will now turn to the second of the plaintiff's theories and that is that there was an implied contract between Prudential and Phillips governing the disclosure and use of Prudential's concept for a petrochemical core facility.

There are essentially two types of contracts, express and implied. Contracts are said to be express contracts when their terms are stated by the parties either orally or in writing.

Contracts are said to be implied when the terms are not stated expressly but from all the facts and circumstances, considering the words and acts of the parties, it may be inferred or concluded that they reached an agreement, although it was never formally stated. An implied contract is just as binding as a contract made by express agreement.

To establish a contract implied in fact, plaintiff would have to demonstrate by a preponderance of the credible evidence that the parties in their dealings with each other understood if Phillips used the Prudential concept it would pay Prudential what the concept was reasonably worth; that upon that understanding Phillips did so use the concept; and that this arrangement was arrived at not by express words but by such conduct, looked at in the context of the trade and their familiarity with it, that makes it clear that such was the understanding they reached.

Under this theory, to find Phillips liable, you must find that Prudential parted with something of value as consideration for this agreement. Prudential contends that the thing of value was its concept. To be of value for purposes of this theory the concept must have taken expression in concrete form. There is no requirement for this purpose that you find that the idea was secret, novel or original.

There is no requirement that the disclosure had been made as a result of a confidential relationship. However, you must find that by their actions the parties may be presumed to have reached an agreement.

Plaintiff contends that in its dealings with Phillips in regard to the oil import quota and petrochemical facility it was understood that if Phillips used Prudential's concept, Phillips would compensate Prudential for the reasonable value of the concept. Prudential claims that upon this understanding it made available its concept for the project and upon this understanding Phillips used it.

Defendant denies that such a contract ever existed and contends that plaintiff's idea was never used by it in any way. Defendant admits that Prudential approached Phillips with regard to a petrochemically oriented refining project in Puerto Rico. Contrary to plaintiff, however, defendant asserts that Prudential asked it only to supply crude oil to Prudential and purchase some of the products of Prudential's proposed project.

Defendant also asserts that plaintiff's plan for a petrochemical core plant failed to receive the necessary approvals of the Puerto Rican Government and that some time afterwards, Phillips submitted a plan, which differed in all material respects from Prudential's, that Phillips made commitments to the Commonwealth of Puerto Rico and to the United States Government, none of which commitments were emboied in Prudential's concept, and that it was

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as a result of these commitments Phillips obtained the necessary approvals, and constructed a petrochemical complex.

As I have explained, the burden is upon plaintiff to establish that defendant promised to compensate Prudential for its concepts related to a petrochemically oriented refinery project in Puerto Rico if used in any substantial way in developing defendant's plan for a petrochemical project in Puerto Rico.

For Prudential to recover on this theory, you must find that the words and acts of the parties were such that it might be presumed that they entered into a contract. In determining this, you are to look at the manifestation of the party's intentions in their words and acts and not to any intention, even if it is actual or real, that was not disclosed to the outside world.

In other words, the intent of the parties is determined by considering the relationship of the parties, what they said and that they did and all of the surrounding circumstances. A person's secret intent has no bearing; only the intent indicated by his words and acts may be considered.

Members of the jury, I will turn now to the final theory upon which case is presented for your consideration, the theory of a contract implied in law or quasi-contract.

There has been use of the word "quasi" in this trial. You have heard witnesses talk about quasi-public utility and now I am about to talk about quasi-contract.

The prefix "quasi" as I am sure most of you will remember from school, is a Latin word, the meaning of which is "Appearing as if, or simulating in appearance, or not fully genuine."

In legal phraseology the word quasi is used to point out that one subject resembles another to which it is compared to a certain extent, but that the two also vary intrinsically. So a quasi-public utility would resemble, but vary intrinsically from a public utility, and a quasi-contract would resemble, but vary intrinsically from a contract.

A contract implied in law or quasi-contract may exist where there is neither an express nor an implied contract. This theory is sometimes referred to as the doctrine of unjust enrichment. A contract implied in law may arise in a situation between the parties whereby it would be inequitable or unfair by virtue of breach of confidence or some similar ethical violation for defendant to profit from the use of something that it was given by the plaintiff.

The mere fact that one party benefits is not sufficient to require it to compensate the other party for that benefit under this theory.

Rather, plaintiff must demonstrate that the defendant has acquired these benefits wrongfully. Under the circumstances of this case, if you found that Phillips acquired its knowledge of Prudential's concept through a breach of confidence or misrepresentation that it would develop the idea along with Prudential, you could find that these circumstances are such that Phillips ought not be permitted to retain its benefit without compensating Prudential for the part, if any, it played in providing that benefit.

Unjust enrichment exists where the product of a promoter's thoughts and efforts is knowingly received and used by another for his own benefit without compensating the promoter. IN such a case, even though there is no express agreement to share the benefits obtained from exploiting the idea, the law implies a duty to restore to the rightful owner its fair share of the benefit conferred upon the wrongdoer.

Obviously, the plaintiff must demonstrate that its contribution for which it has not been compensated contributed to the success of Phillips' project. For Prudential to recover under this theory, plaintiff must demonstrate that Phillips benefited in some measure from Prudential's contribution.

It is not necessary under this theory that you find that Prudential's concept was novel, or that it was secret. You must find, however, that the contribution that was made was the contribution of Prudential Connecticut, or Shippee, Willey or Young, and not a contribution made by others unaffiliated with Prudential.

The jury may infer from the fact that Shippee, Willey and Young have testified here, and what they have said on the stand, that Shippee, Willey and Young were in fact acting for Prudential Oil Corporation, a Connecticut corporation which assigned its rights to Prudential Oil Corporation, a New York corporation, the plaintiff here. There is no evidence that this plaintiff has any standing to bring any claims based on any activities of Mr. Anderson or Mr. Wright, and specifically, there is no evidence that Anderson or Wright, if they had any share in the matter, had authorized this plaintiff to bring an action in their behalf.

The plaintiff may not recover for any efforts of Wright or Anderson, and if the jury finds that a legally protected concept was developed through the joint efforts of Mr. Willey, Mr. Shippee, Mr. Young, Mr. Wright and Mr. Anderson, then it will eliminate from its consideration that proportion of the effort attributable to the work of Anderson and Wright for which the defendant Phillips has previously paid a retainer fee to Mr. Anderson.

Furthermore, there will be eliminated from any such consideration the value of any consideration towards the concept made by Mr. Coan or Mr. Chapman or by persons employed by the Economic Development Administration of Puerto Rico, or by any of its representatives, including Mr. Durand, Mr. Van Hyning or Mr. Diaz-Hernandez or Mr. Irizarry.

Members of the jury, I will now discuss damages. You will reach this issue only if you have decided in favor of plaintiff upon any one of the three theories I have discussed with you this far. By instructing you now about the law applicable to the computation of damages, I do not suggest that you find for or against the plaintiff upon any or all theories of liability. That is for your decision.

Now, if you find that there existed an implied contract between Prudential Connecticut and Phillips, that is if you find for the plaintiff upon the theory which I have referred to as a contract implied in fact, the damages you would award would be the reasonable value of the concepts disclosed to Phillips and subsequently used by it.

Reasonable value is often said to be the price that a willing buyer would pay a willing seller for an article or for a service. Needless to say, there is no established price quotation book or anything like that to wich we can look to determine what an oil company would pay the person who performed such services or furnished such ideas as you may find Prudential performed in this case.

Before you can attach a value to the material that you find Prudential disclosed to Phillips, you must determine exactly what was disclosed. You must also determine whether what was disclosed was conceived or belongs to Prudential Connecticut through Messrs. Shippee, Willey and Young.

Prudential has a right to seek compensation under this theory for concepts those three people originated or the services they performed. As mentioned earlier, Prudential is not entitled to be compensated for concepts originated by Chapman, Coan, Brown, Anderson, Wright or Universal Oil Products or by public officials in Puerto Rico or others.

If you find that the concepts disclosed to

Phillips by Prudential and used by Phillips were not original, then the value of the services performed by Prudential will relate only to the value, if any, of compiling or generating the material which Phillips used.

(Continued on next page.)

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In determining the reasonable value, you may consider the use to which it was put as one factor in considering its worth. You may also consider the time and effort which persons affiliated with Prudential expended in conceiving and promoting this concept.

I need not belabor this point, but we can all imagine significant ideas that have been conceived without years of work, and the fact that they were conceived of so easily does not diminish their worth. However, it is a factor which you may consider.

For your guidance in this endeavor, each side has presented the testimony of experts who have sought to evaluate the worth of the concept which Prudential claims to have disclosed. Earlier, I instructed you concerning the manner in which you are to treat expert testimony. YOu may compare the contribution that you find that Phillips made to the project with the contributions made by others to this project, including the contributions of Phillips itself.

You may also compare the function performed by Prudential in the development of this project with the functions performed by persons similarly situated in other projects.

The weight that these comparative evaluations will have for you should depend upon the degree to which you find the position of Prudential in this project similar to or different from the position of the party with whom you are making the comparison.

To sum up what I've said so far, if you find from the circumstances disclosed by the evidence in this case that there existed an implied contract between the parties, then you will award the plaintiff the reasonable value of what it provided, be that the value of a concept which Prudential's people conceived or be it the service of compiling existing information and presenting it as a coherent whole.

Now, if you find that Phillips misappropriated a legally protected business concept under the first theory which I discussed or ifyou find that Phillips has been unjustly enriched by reason of a breach of a confidential relationship, giving rise to a quasi-contractual liability under the third theory which I discussed this morning, then in either of those events, you may consider the profit that the defendant actually derived from the use of Prudential's concept.

As I instructed you with regard to the measure of damages applicable to a contract implied in fact, you must determine what it is that Prudential contributed to the project. You may award that portion of the profits or value of the ultimate project as you find attributable to the contribution made by Shippee, Willey and Young. Needless to say, a project of this magnitude depends upon a number of factors and individuals for its success.

And accordingly, you are to consider the value of the concepts and not the value of the entire Puerto Rican Phillips Core Refinery business or the profits therefrom.

In determining the manner in which Phillips profited from the use of Prudential's concept, if it did, you may also consider any obligations that you find that Phillips incurred to others in the development of this concept, and the value of Phillips' own work, both as reducing the amount of profits, if any, attributable to Prudential's efforts.

Now, damages are awarded to make a person who has been damaged or a corporation which has been damaged whole, and to put him or it in the position which it would have been if its rights had been honored without the necessity of any litigation. Damages are not awarded to punish anybody or to impose a fine on anybody or to express any displeasure with the conduct of any party to the lawsuit.

In awarding any damages which you may find payable in this case, you are to restrict yourself to an amount which would be fair to place the injured party in the position he would have been and should have been, and you are to do so without attempting to be either generous or stingy.

This is a matter like all fact matters in the case to be decided fairly and impartially by the jury, and without any motive of any kind, except to be fair and just to both parties.

Profits should be estimated by you prospectively based on the circumstances which existed when the core plant first became operative. The tort of misappropriation and the quasi-contractual liability became complete when the concept, if it was misappropriated, was actually taken and used by Phillips.

The jury will determine this date as an issue of fact, and you may consider it to be the date that they took possession and use of the brochure, the date that Mr. Conn gave it to Mr. Waldby, or you may consider it to be the date that they received the import quota, or the date on which they opened the core plant, or whatever date appears proper to the jury under all of the facts of this case as being the date upon which the actual tort of misappropriation occurred, or the date upon which the contract implied in fact was deemed to have been fully performed by Prudential.

You will base your considerations upon the situations as it then presented itself, and the results of this case are not to be distorted by the fortuitous fact that we are now trying it in 1976, when circumstances in the petroleum industry are different, and when we have an actual history of operation of this petrochemical plant before us.

You should determine these issues, if you reach them, prospectively from the vantage point of 1965 or 1966 or 1968 or whatever date you find, 1963, even, whatever date you find that the cause of action arose, if it did occur, and the evidence as to what took place later is available to you only for the purpose of testing the validity of the estimates, and you can't decide this case based on hindsight or knowledge acquired long after the event simply because of the fact that the trial has been delayed.

Now, in your deliberations you are not to conisder the fact that the lawsuit was not commenced until 1967 or the fact that the case was not brought to trial until now. These matters are not relevant to your determination of any issue in this case at all, except that you can consider the lapse of time between the events and the time of the testimony given by witnesses as bearing upon the ability of the witness to recall events of 1962 and 1963 and as bearing upon the credibility or weight to be attached to their testimony.

But the delay in bringing the case, or the delay in trying the case after it was brought, are not matters for your concern, they are not attributable to either party to this litigation, and are not for your consideration in any way.

Similarly, the actual experience in the so-called fibers or nylon plant is a matter to which you will give only such weight as you deem it properly entitled. If you consider that the fibers plant investment resulted from a separate investment decision by Phillips, which was improvident and unsuccessful, then you will disregard any losses suffered as a result of entering into that fibers plant as opposed to some other kind of satellite plant which might have been entered into.

By the same token, you must recognize in your consideration that it was foreseeable in 1963 or 1965 or 1966 or 1968 that the satellite plant or plants into which the profits of the core plant would have to be reinvested as a condition of the project might very well turn out to be unprofitable as apparently in fact did happen to the fibers plant, and this is a factor which you may and should consider in your deliberation.

Although more than one theory of liability has been presented to you for your determination, the plaintiff may recover only once for its damages, if you find that it has been damaged.

Since the different theories of liability suggest different computations of damages, if you find the defendant liable on two distinct theories and you find in computing the damages as I have instructed you that different amounts of damages are applicable, you should award the plaintiff damages in the larger of the two amounts.

Now, I'm sure it is clear to you,members of the jury, that in reaching your verdict you are not to be affected by sympathy for any of the parties or by any concern about what the reaction of the parties to your verdict may be, whether it will please or displease anyone or be popular or unpopular, or indeed, by any consideration outside of the case as it has been presented to you in this courtroom.

You should consider only the evidence, both the testimony and the exhibits, find the facts from what you consider to be the believable evidence, and apply the law as I have explained it to you this morning, and doing that, you will come out with your verdict and you will make a fair and just verdict, no matter whom the verdict helps or hurts.

One or two more words about deliberating as jurors:

It is your duty to try the issues in this case fairly and impartially, and each juror is entitled to his or her own opinion, but you are required to exchange views and discuss with your fellow jurors. That is the very purpose of jury deliberation, to discuss the evidence, to talk about it with each other, and to reach a just verdict which will represent the verdict of all of you, based on the evidence and the result of your deliberations.

It is improper to reach any verdict by compromise. The verdict must represent the honest and sincere viewpoint of each juror as tc how this case must be decided.

If you have a point of view, and if after reasoning with your fellow jurors it appears that your judgment in the case is open to question, then of course you should have no hesitancy in yielding your point of view and agreeing with the others. But that is only if you are convinced that the opposite point of view is really one that satisfies your individual judgment and conscience.

However, you are not to give up a point of view that you conscientiously believe in simply because you are outnumbered or outweighed or outvoted by the other jurors.

To return a verdict, it must be unanimous, and the questions on the special interrogatories, each question, must be unanimously answered.

I ask you to deliberate with care and in a courteous and friendly fashion so that everyone's opinions will be heard and listened to by all of the others.

If you are unclear about any instruction which the Court has given, send out a note signed by the foreman, setting forth what the jury would like to have. In your note, do not indicate how the jury stands as to any matter at that time. That I do not want to be told in any note. But if there is anything that you want to have read back to you, if there is the testimony of any witness that you'd like to have re-read, try to pinpoint that as narrowly as you can, but we will do it.

Exhaust your own recollection first, and if you want certain testimony read, it will be read to you.

I ask you, if you wish to see the exhibits, or if there are any particular exhibits that you wish to see, send out a note from your foreman, and the note will either ask for all of the exhibits, or ask for whatever exhibits the jury wants to have. It is not within my power to direct you to ask for the exhibits, but I can assure you, that the documents in this case you may find to be important and helpful, and if you want to see all the exhibits which are in evidence, you should send out a note to that effect.

At this time I want to thank the alternate jurors, and I certainly do appreciate your faithful attendance here. Please go to room 109 and get your certificates.

In just a moment I am going to excuse you with my deep personal thanks for your faithful attendance here. I am going to ask you until this case is decided, which might not be today, please do not discuss the case with anyone. Please don't speak with any member of the jury or any attorney or anything like that until a verdict is returned.

Of course, when that happens, you will have all your rights of free speech. In the meantime, I ask you not to say anything about the trial or your reaction to it, or how you feel the case should be decided, until such time as a verdict is actually returned by the jury.

Now, Mr. Howletter, Mr. Rumely, and Miss Sturdik, you are excused. You may go to Room 109 and get your certificates.

(Alternates excused.)

THE COURT: We have this special interrogatory for the jury which is a two-page form. One of these will be signed by the foreman after the jury has agreed on the answers to all the questions. And I ask you, Mr. Colon, in dealing with this form, please be extremely careful to read all of the questions, and read the instructions at the bottom of the form, and where it tells you to omit a question, it says here, if your answer is no, omit question 2, and proceed to answer 3 -- there are such instructions -- please make sure that those instructions are followed precisely.

It may be that I might add a question to this form during the course of your deliberations, although I'm not certain at this time.

If there is anything unclear about the questions, you may send out a note.

I have tried to make the questions brief. However, in answering these questions, you are bound to consider and follow every matter which I mentioned to you in my instructions. So if there is something omitted from the question which I discussed with you, you are to read that into the question, evertyhing that is in my charge or instructions.

Now, at this time, would you swear the marshal, please, Mr. Cloidt?

(Marshal sworn.)

THE COURT: Now, at this time, members of the jury, I am going to ask you to remain seated in the jury box for a few moments and not to discuss the case.

I also ask you, when you go out to lunch, do not discuss the case in an open restaurant where anybody could overhear it. Your deliberations should occur only in the jury room, when all jurors are present, and everybody has an equal chance to listen and to participate.

I'm going to go in the next room and confer with the attorneys and see if there are any additional instructions which they would like to have the Court give at this time. And because you may not have received all of the instructions, kindly do not talk with each other about the case while you are seated in the box; and keep an open mind, in case there is something else that I will be giving you in the form of additional instructions.

This should not take very long. Please remain just where you are.

(In the robing room.)

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: As I think I made clear earlier, you have an exception as to any matter which you made a written request to charge and the Court has not substantially charged as requested, so you need not -- those will be docketed and you need not repeat those at this time, since we don't want to keep the jury in the box too long.

I have two additional interrogatories which Mr. MacCrate has just handed me and they look all right. If there are no objections to them, I will take them.

MR. FARRELL: They're all right, your Honor.

MR. MARKS: Your Honor, I would like to take specific exception to that portion of your charge that deals with the consideration that the jury may give to the profits earned by Phillips.

First, your charge did not follow the proposals outlined in our proposed charges --

THE COURT: To that extent you already have an exception. What else was wrong with it?

MR. MARKS: Well, specifically, you told them that they couldn't take into account the actual history or use hindsight with regard to the profits. You also told them they couldn't take into account the value of the core or the profits derived therefrom and that just flatly is not the law. All the cases --

THE COURT: I don't think I really told them that But you may have an exception as to what I did tell them.

MR. MARKS: I believe you derived that from Mr. MacCrate's proposed supplemental.

THE COURT: I didn't take it all. I really didn't, Mr. Marks, but you may have an exception as to that portion of the charge.

MR.MARKS: I believe the jury should be instructed that if Phillips derived profits from utilizing Prudential's concept, then it must award damages and may take into account the profits that were derived by Phillips from the use of Prudential's concepts and I don't think that is clearly stated in your charge.

THE COURT: I will stand on that aspect of the charge and you have an exception.

Is there anything else?

MR. MacCRATE: Yes, your Honor.

THE COURT: Wait until Mr. Marks finishes.

MR. MacCRATE: Oh, yes, your Honor.

MR. MARKS: No, that's the thrust of our exception, your Honor, with regard to your instructions concerning the utility of profits in the jury's calculated damages.

THE COURT: I thought I was clear, but I will repeat it just so I can be certain. Damages are available to plaintiff to the extent of the profits derived by Phillips from exploiting the idea or concepts of Prudential. However, the jury may and should and indeed must consider other components which entered into the organization in connection with this refinery, and all of the profits of the refinery are not attributable to the efforts of Prudential. Some of them I believe are attributable to the efforts of Chapman and Coan, some to the efforts of the EDA and to some extent, to the fact, as told to me during this case, and I have not independently researched it, that only with a history of oil importation could apply for an oil import quota, and that was a sort of franchise which Phillips possessed.

I haven't verified that. It seems to me phenomenal, but maybe that's what they did. But that's been stated on this trial record without contradiction by both sides. And certainly that valuable franchise contributed towards the profits too. I will stick on what I have said to the jury on that point.

MR. MARKS: In that regard, your Honor, as we pointed out earlier, the Dwayne Jones and other cases we have cited over and over again indicated that the jury is entitled to consider the profits that Phillips has made up until the date of this trial, and I think --

THE COURT: Based as a result of their tort.

MR. MARKS: That's correct.

THE COURT: Not as a result of.

MR. MARKS: That is not included in your charge.

THE COURT: I will stand on the charge, Mr. Marks, but I think some of these profits made were based on the fact that Phillips had the peculiar ability to get an oil import quota because it had a history of importing and part of them were made as a result of Phillips' own efforts and of the efforts of Van Hyning and others.

I will stand on the charge, Mr. Marks, but you may have an exception.

Are you now completed?

MR. MARKS: Yes, sir.

THE COURT: All right, now, Mr. MacCrate, I will hear you.

MR. MacCRATE: If your Honor please, by way of reiterating an exception that I took at the time that the count was added with respect to an implied in fact contract, I would like to note an exception expressly at this time, any instruction with respect to an implied in fact contract on the grounds that no reasonable juror could find that such an agreement in fact exists in this case on the evidence before it.

THE COURT: You may have an exception to that. I think they could. I think one of the things which would help them find such an agreement is the presumption against wrongdoing. There is a general presumption that people conduct themselves honestly and fairly. If that presumption were applied, then you had a contract implied in fact, the minute they plagiarized the brochure.

All right. You have an exception as to that.

MR. MacCRATE: Finally, your Honor, an exception with respect to the absence in the definition of the confidential relationship for purposes of misappropriation of a statement that Phillips must have understood that the material was being disclosed to it in confidence.

THE COURT: I believe that a conclusion that they reasonably should have understood it is implicit in the instructions that I have given here. I think the evidence is adequate to show that such a relationship arose, and I'm relying in part on American Can TCP Corporation against Strauss Stores and in part on Robbins against Frank Cooper, but you may have an exception as to that.

Is there anything else?

MR. MacCRATE: Nothing further.

THE COURT: I will take the two additional questions if somebody would give them back to me.

(In open court.)

THE COURT: Members of the jury, I have no additional instructions to give you at this time. However, I have agreed with the attorneys that some additional questions should be added to the written form of special interrogatories, so I'm not able to give you that right at this moment. That will be sent into the jury room as soon as I have added the additional material. That seems to turn out fortunately, because right now the United States marshal is prepared to take you to lunch.

I ask you again, do not talk about the case in the restaurant.

Where are they going?

THE MARSHAL: To Aldo's, your Honor.

THE COURT: All right. Everyone else will not go to Aldo's.

The jury may now withdraw.

(Jury retired at 12:25 p.m.)

THE COURT: We will be in recess for approximately one hour. And I'd like you to come back then so that this final jury's interrogatory may be reviewed by each of you before I send it into the jury room , and also, of course, I have asked you to get your exhibits together in some orderly condition so they could be handed in, if asked for.

We will be in recess for approximately one hour .

(Recess.)

AFTERNOON SESSION

(1.55 p.m.)

(Jury not present.)

THE COURT: Good afternoon, gentlemen.

We now have the proposed form of special verdict in what I trust is its final form.

I am about to bring in the jury and explain to them what its purpose is.

MR. FARRELL: Ihave no response. They are find, your Honor.

MR. MacCRATE: They are fine, your Honor.

THE COUTT: All right.

Bring in the jury, please.

MR. MARKS: Your Honor, before the jury comes in, I would like to raise again this point of the instructions with regard to the consideration of profits. There seems to be some confusion as to what your Honor actually charged on that point, and to clear up any confusion, since this is deemed by us, as plaintiff's counsel, to be a matter of critical importance in the case, we would ask that your Honor have the charge typed so that it can be examined and in the event that the charge was not as clear as your Honor may have desired, that that be corrected.

THE COURT: I decline to do so, Mr. Marks.

Of course it will be typed as soon as the reporters can type it.

If the jury asks any question about such matters, you will be heard before I answer the question.

Please bring in the jury.

Oh, we have a note from the jury, a request for the following exhibits:

P-214 and P-215, J-45, J-43, J-50, Conn-Chpamn-Gibbs brochure.

I am marking that as Court's Exhibit 6.

(Marked as Court's Exhibit 6.)

xx (Jury present.)

THE COURT: Good afternoon, members of the jury.

We now have the form of special interrogatories, the questions that are posed to you.

You will recall that I mentioned to you that in answering these questions you must bear in mind everything that I have instructed you on. It is impossible to frame a question that includes every single element or item or every matter of law which the Court has mentioned in its instructions, so the questions have been made relatively short, but before you answer them, you have to think about all those things that I asked you to consider in my instructions previously given.

Now we will want to receive back from you, when you have reached a verdict, one copy of this paper signed by the foreman. Of course, all of you will be asked -- it will be read to you in open court, and you will each be asked if that is your verdict. But I am giving Mr. Colon six copies so that each of you will have one to look at or to treat as a draft for purposes of discussion or handle it in any way that you wish, but we want to get one back, filled out according to your decision of the entire jury, what the foreman reports as the verdict of the entire jury.

And I must tell you the instructions on here about which questions to omit are extremely import, and some of these questions are to be answered only if you have answered previous questions in a specific fashion.

You will read it, you will see it, and if you have any questions about it, please write a note.

I might say also at this time that I have your note which has been marked Court's Exhibit 6, where you request certain exhibits, and I am taking that up right now.

So you may now withdraw to the jury room.

(Jury left the courtroom at 2 p.m.)

THE COURT: I think in fairness I ought to state to you that this Exhibit 6 has the name spelled as Conn, C-o-n-n. I think they mean Coan.

Off the record.

(Discussion off the record.)

THE COURT: May the record show that counsel have agreed upon the exhibits to be carried into the jury room in accordance with the last note and the clerk is now delivering them to the United States Marshal to take in and simply hand them to the foreman.

Well, we can be in recess until the next move. The last question asked of the Court by Mr. Marks, or the last suggestion made, or whatever you want to call it, presents another matter which may not be premature to talk about. Perhaps you would rather respond informally or even off the Record.

I think a time will come when the Court will have to ascertain what reasons, if any, combined to create such tremendous delay between the time the action was brought and the date of trial.

I am not going to go into the administration of any other docket by any other judge in this court, but this is such a strikingly long time, and it's been with me sincr about March of 1975; part of that delay is attributable to the fact that I attempted to certify an interlocutory appeal and it took some time for the Court of Appeals to ascertain that they would not entertain the appeal on the jurisdictional question. But I think perhaps you ought to take that under consideration here. Maybe you can agree on a factual statement.

I don't ask you to respond immediately if you don't want to, but you might take it under advisement.

MR. MARKS: There have three motions made by the defendant, your Honor, in this case, after the case was ready for trial.

There was a motion before Judge Edelstein to permit an examination after all discovery was closed of Mr. Javits, which motion was granted.

There was then a motion --

THE COURT: When did that take place, Mr. Marks?

MR. MARKS: I'm not sure of the date, your Honor, but I believe it was January of '74.

There was a motion made by the defendant thereafter to strike out jury demand, which motion was sub judice before Judge Edelstein for, I believe, approximately a year or more.

Then when that motion was decided, there was a third motion made by the defendant based on a challenge on diversity of citizenship which motion was decided by your

Honor.

THE COURT: That is the one I certified for appeal but they wouldn't take it.

MR. MARKS: That's correct, your Honor.

THE COURT: Then there was the motion to compel the election. I think that it has proceeded with satisfactory diligence and speed during the time that I have had it, but I think that with such a tremendous lapse of time this is a matter we are going to have to consider at some point.

MR. MARKS: I think the fact that the defendant made piecemeal motions and made them at the dates they did with no new facts is indicative of the delay.

THE COURT: How long did your office have this case?

MR. MARKS: We have been involved in this case for approximately --

MR. FARRELL: Since February '72. We took the first deposition of Mr. Learned.

MR. MacCRATE: Your Honor, there is a long prior history, as you have indicated.

THE COURT: There were no depositions until February?

MR. FARRELL: Many, but not of the defendant.

MR. MARKS: There were extensive depositions and other discovery taken of the plaintiff, including depositions at great length of Mr. Shippee, Mr. Willey and Mr. Young, Mr. Little and so forth.

MR. FARRELL: Also document demands by both sides.

MR. MARKS: Interrogatories by both sides and so forth.

MR. MacCRATE: The early history of the case, your Honor, was that the answer was served in October of 1967. Defendant immediately sought the deposition of plaintiff and commenced the deposition of plaintiff by Mr. Shippee on about the 27th of October of 1967.

The deposition was broken in order to take the testimony of Mr. Willey for a day, and then Mr. Shippee's deposition was resumed on November the 1st of 1967.

From that time until the Court called in the plaintiff in November of 1969 --

THE COURT: That was at the beginning of the individual assignment calendar, as far as this case was concerned.

MR. MacCRATE: Yes, your Honor.

THE COURT: Judge Edelstein was one of the four pilot judges who began the experiment with the individual assignment calendar and about that date this case was placed on his docket.

MR. MacCRATE: And at that point the plaintiff responded to what had been outstanding requests that had arisen in the course of the first few days of deposition in the course of the fall of 1967.

Following the pretrial conference, based on the individual assignment to Chief Judge Edelstein, the discovery proceeded with additional testimony from Mr. Shippee, Mr. Willey and Mr. Young.

There were interrogatories propounded during the summer of 1970 and there were further interrogatories propounded in the first half of 1971.

The discovery remained in that context until the fall of 1971 when further depositions were taken, and in the spring of 1972, as Mr. Farrell has said, the first depositions were taken of the defendant by the plaintiff.

MR. FARRELL: I don't believe it was the spring. In February.

MR. MacCRATE: I stand corrected. It was towards the end of February of 1972. And following the depositions in the spring of 1972, there was an inquiry as to whether there might not be certain facts stipulated, and time was devoted to the developing of a stipulation of facts.

The hiatus between the first draft of the stipulation and a response to that -- I believe, in the first instance, that defendant's counsel prepared the stipulation, and how many months it was before plaintiff responded I cannot now without referring to the record repeat. But there was a period for the plaintiff to respond to the proposal for the stipulation.

Then there was a further period when defendant was considering the plaintiff's proposals, and this process went back and forth consuming several months time, each time a revision was made in the proposed stipulation. And it was in that posture that the matter came to the point of incorporating the stipulation of facts into a proposed pretrial order, and in connection with the proposed pretrial order there was occasion to identify what witnesses would testify and also to list exhibits.

There was a request made by the defendant in the course of responding to the proposed provisions of the pretrial order that had been proposed by plaintiff that we be advised as to the subject matter of the interrogation of expert witnesses, and we were permitted to propound interrogatories relating to the expert witnesses' testimony.

The time when the motion to strike the jury demand was made I do not have before me at the moment.

MR. FARRELL: It was argued in December.

MR. MacCRATE: It was either October 1973 or October 1974?

MR. FARRELL: It was argued in December '73. That was probably the date from which it was out of our hands.

MR. MacCRATE: So that the motion to strike the jury demand was presented to Judge Edelstein in October, argued in December, and then it remained sub judice from December of 1973 until April of 1975.

Meanwhile there were further proceedings to which Mr. Farrell has referred while the matter was sub judice, and it was in that condition that the matter was referred to your Honor.

THE COURT: Through the good offices of the ad hoc committee for the distribution of old cases, which has been colloquially referred to as the Pollack plan.
I don't think that is entirely fair to Judge Pollack, but that is what they call it around here.

All right, thank you.

Is there anything said that you disagree with basically?

MR. FARRELL: Not basically.

MR. MARKS: There was a history of depositions, your Honor, the dates of which we don't have at this moment, but there were other depositions as well of Mr. Little and third party witnesses.

THE COURT: All right.

Thank you, gentlemen. We will be in recess.

MR. JEMISON: Your Honor, may I be excused from being present at further proceedings in this matter?

THE COURT: Yes, you may, Mr. Jemison.

MR. JEMISON: And in the event I don't have the good fortune of appearing in your court again, I want to express my appreciation for the very evenhanded manner in which you conducted the trial.

THE COURT: It's fine to talk that way before the verdict but --

MR. JEMISON: No, sir, whatever the verdict is will not change my judgment in that regard.

THE COURT: Off the record.

(Discussion off the record.)

(Recess.)

(The following took place at 2.50 p.m.)

THE COURT: We have a note from the jury which has bee marked Court Exhibit 7 for identification which reads as follows:

"Request the following:

"Stipulated facts; Judge's charges relating to theories. Example, legally protected business concept."

Now, that stipulated facts, I think that consists of Court's Exhibits 2 and 3.

On the other, I don't know whether they are asking for me to review the entire charge. Perhaps the best way to interpret it is as to the legal theories. If anyone has any application or suggestion or request I will hear it. Otherwise I will call them back in and deal with it.

MR. MacCRATE: What does your Honor propose with respect to the charges relating to theories?

THE COURT: In the absence of any request or suggestion to do it differently, I would go through the three separate theories and redefine them, probably not word for word, I would summarize.

MR. MacCRATE: I would have no objection to that, your Honor.

MR. FARRELL: No objection.

THE COURT: Please ask the jury to come in.

(Jury present.)

THE COURT: Members of the jury, your note has been received and marked Court Exhibit 7 for identification.

The stipulated facts are contained in Court Exhibits 2 and 3 and they are available to you and may be taken with you when you leave the courtroom.

As far as my charges are concerned, I have been reading from notes, some of which are in handwriting and some of which are typed, and it is not possible for me to place in your possession a complete, clean typed copy of that part of my instructions.

However, I will review briefly with you or summarize what I have mentioned to you and I assure you that it is my purpose to cooperate 100 per cent with anything asked for and if that is not satisfactory and you want anything more read to you again, send out a note and I will ask the Court Reporters to read it directly from their tapes word for word but I think perhaps, for these purposes, if I begin by reviewing the different theories and summarizing them for you, that may be satisfactory for your purposes. If not, please let me know.

I pointed out to you in my instructions previously given that Prudential relies upon several distinct theories upon which it contends Phillips is liable and I mentioned to you there were several elements which would be of concern to you on one theory but not on another and therefore it is important to keep these theories distinct in your mind.

There are certain issues which will have to be resolved, to all theories and then I told you that on the special form of verdict these would be pinpointed so that you would be able to answer the questions posed by the different theories.

The first theory that I discussed was based upon a claimed tortious misappropriation of a legally protected business concept and I named four elements which had to be proved if the plaintiff was to prevail as to the first theory, misappropriation of a legally protected business concept.

The first element, the plaintiff Prudentiawl conceived or formulated or developed a concept or material.

That the concept or material developed or conceived or formulated by plaintiff was legally protected. That is, it was of the sort of concept or material which is entitled to be considered as legally protected.

Third, that plaintiff's legally protected concept or material was used by the defendant Phillips; and, Fourth, that the defendant's use of plaintiff's legally protected business concept or material was in breach of a confidence reposed in the defendant by plaintiff or resulted in some misrepresentation by the defendant to plaintiff.

Then I mentioned that the first element requires that the plaintiff has conceived or developed a concept and I told you what the claims of the parties were with respect thereto and I described the claimed concept to you and I would be willing to read it back if the jury wants to have that part read. If you find you want it read just send me back a note.

Then I said that a legally protected business concept may be viewed as a form of property and as such its owner is entitled to protection.

I said to you that the defendant Phillips contends there is evidence in the case that the concept which Prudential claimed to have conceived was in fact conceived in whole or in substantial part by persons not affiliated with Prudential.

I said to you further that Prudential was not the first party to conceive of the idea of a third petrochemical facility for Puerto Rico; that the Government and other promotional groups had been involved before

Prudential claims to have shown interest or developed what is claimed as its concept.

Plaintiff knew of the attempts of prior groups but claimed its ideas differed from the unsuccessful ideas of previous groups and, indeed, its ideas were designed to overcome difficulties that prior groups had encountered.

I informed you that an issue for your determination here is whether Prudential, acting through its officers and agents, conceived of the idea. If you find the concept was not conceived by Shippee, Willey or Young or rather was the product of efforts of others, Prudential would not be the party to whom the concept belongs and would not be entitled to seek damages for its use or misappropriation.

I then took up the question of whether, if you find that Prudential did conceive of the original concept for the development of a petrochemical facility in Puerto Rico, whether this concept is legally protected. I told you that there is no precise yardstick to define legally protected business concept and whether this concept if in fact it was developed by Prudential, rises to the status of a legally protected business concept.

That is a question of fact which you the jury will decide based on all of the evidence in the case and using your own common sense and human experience.

I pointed out to you that not every idea or notion or plan which somebody has rises to the level of a legally protected business concept. I pointed out to you that a simple one-shot suggestion to a businessman like why don't you have a sale or something like that would not be a legally protected business concept.

A legally protected business concept may consist of an idea, plan or compilation of information which may be used in one's business and which gives a person having it a business opportunity or competitive advantage over somebody else. The concept should be an idea for continuous use in the operation of the business.

To qualify for a legally protected concept, it must be original and it need not be novel in the sense that it is sufficiently imaginative to qualify for protection as an invention under the patent laws.

I instructed you that the requirement for originality may be satisfied even if some or all of the elements of the concept were generally known to persons in the industry, if joining the ideas together was original. The idea will still be original if after its disclosure persons in the industry believed it to be based on what was previously known and likewise the idea would still be original although persons other than Shippee, Willey and Young were capable of conceiving it.

I pointed out that another element for your consideration in determining whether the concept was legally protected is whether it was secret. The originator of the concept does not relinquish its secrecy by disclosing it to another party under circumstances in which he believes the other party will treat it as a matter of confidence.

I said that you should consider the extent to which the information was known to persons outside Prudential; also the extent of measures taken by Prudential to guard the secrecy of the information as well as the value of the information to Prudential and to anyone interested in developing a petrochemical core facility in Puerto Rico.

I said another factor is the amount of time, effort or money expended by Prudential or its officers or agents in developing this concept, as well as the ease or difficulty with which the information could be lawfully acquired or independently developed by others.

I instructed you that the concept must rise to a level sufficiently unique or important to the success of a venture so that reasonable people contracting with each other in fairness and at arm's length woujld expect to and would pay money to obtain the benefit of the concept.

A concept which is so simple or basic or so usual, so generally known and commonplace as to lack that value ordinarily associated with ownership or property, will not be a legally protected concept under plaintiff's first theory.

However, a concept which is in that classification of ideas for which reasonable businessmen would expect to pay and receive money for disclosure of the concept will rise to this level.

To be a legally protected business concept, the concept must have been reduced to some tangible form. It is not enough if what was expressed to defendant, if anything, was vague, uncertain and undeveloped.

Now, the plaintiff as I pointed out to you contends that the idea was in tangible form and expressed in exhibits P-214 and 215, the brochures that Prudential claims were delivered to Phillips and I point out to you Phillips contends that plaintiff's ideas were not developed in a concrete way in the brochure and were expressed in a vague and indefinite way, not susceptible of specific understanding or use and, in any event, were not original with Shippee, Willey and Young.

Those are the matters which you will consider to ascertain whether the concepts or ideas rise to the level of being a legally protected business concept.

I then went into the third element that must be proven and that is to show that whether Phillips used plaintiff's concept in the petrochemical core facility ultimately built in Puerto Rico or the presentations made to the Economic Development Administration of Puerto Rico, or in the application to the Oil Import Board or Department of the Interior to obtain the necessary oil import quota. I will go into that more deeply if you would lik me to review the issues. I pointed out to you that there is no requirement that it be used in exactly the form in hwich the defendant received it but that its use must be substantial in order to satisfy this element of the claim and if the contribution by plaintiff's legally protected concept is so slight that defendant's idea can be said to be derived from other sources, then the defendant would not be liable on this theory.

And I told you that if they did use Prudential's concept in part and in changed form but not so much as to create an entirely new project, that could be or would be, if the jury so finds, sufficient evidence of misappropriation.

I pointed out that the extent of modifications or improvements if any, made by defendant upon plaintiff's legally protected business concept, would affect the computation of damages or profits.

The third element was the breach of confidence and I pointed out to you that unless there is a confidential relationship, there is no missppropriation of a legally protected business concept.

However, if a party agrees to treat it in confidence or if a party evaluating the proposal or worth of a particular business transaction or proposition offered by another needs to look over the concept in order to be able to decide if it is interested in entering into a deal, and if a disclosure was made not intended to entitle Phillips to make use of the idea but consider Prudential's suggestion for Phillips to enter into an agreement or development of a concept to the benefit of both parties, then you could find a confidential relationship existed imposing on Phillips the obligation not to use the concept which had been disclosed to it.

I pointed out that a confidential relationship might be created by the conduct of parties without express agreement.

3 pm.

Now, the second theory was the contract implied in fact, and I pointed out to you that there are two types of contracts, express or implied, and an implied contract arises when the terms are not stated expressly but from all the facts and circumstances, from the words and acts of the parties, it may be inferred that they had reached an agreement, even though it was never formally stated.

And I said that to establish a contract implied in fact, the plaintiff would have to demonstrate by a preponderance of the credible evidence, that the parties in their dealings with each other understood each of them, that if Phillips used Prudential's concept, it would pay Prudential what the concept was reasonably worth, that upon that understanding, Phillips did so use the concept, and that this arrangement was arrived at not by express words, but by such conduct looked at in the context of the trade, and their familiarity with it, that makes it clear such was the understanding that they reached.

I pointed out to you that there is no requirement of a confidential relationship in order to find a contract implied in fact. However, you must find that by their actions both parties may be presumed to have reached an agreement.

The third theory that I discussed with you was a theory of a contract implied in law or quasi-contract. And

I told you that a contract implied in law or a quasi-contract, may exist where there is neither an express nor an implied contract, that this is sometimes referred to as the doctrine of unjust enrichment.

A contract implied in law may arise in a situation between the parties, whereby it would be unequitable or unfair by virtue of breach of confidence or some similar ehtical violation for defendant to profit from the use of something that it was given.

I pointed out to you that the mere fact that one party benefits is not sufficient to require it to compensate the other party for that benefit.

Plaintiff must demonstrate under the third theory that the defendant acquired these benefits wrongfully.

If you found that in the circumstances of this case that Phillips acquired its knowledge of Prudential's concept through a breach of confidence or a misrepresentation that it would develop the idea along with Prudential, you could find that these circumstances are such that Phillips ought not to be permitted to retain its benefit without compensating Prudential for the part if any it played in providing that benefit.

Unjust enrichment exists where the product of a promoter's thoughts and efforts is knowingly received and used by another for his own benefit without compensating the promoter. In such a case, even though there is no express agreement to share the benefits obtained from exploiting the idea, the law implies a duty to restore to the rightful owner its fair share of the benefit conferred upon the wrongdoer.

Now, I pointed out to you that plaintiff under this theory would have to demonstrate that its contribution for which it was not compensated contributed to the success of Phillips' project, and that Phillips benefitted in some measure from Prudential's contribution, but I told you that under this theory, it is not necessary to find the concept was novel or that it was secret.

Now, I think I made it clear in my instructions that the defendant disputes and denies all liability under any of those theories. I will not go into any further discussion at this time of the respective contentions of the parties in this case unless the jury asks me for something further.

I will say also to the jurors that I mean it very sincerely when I say to you that I will be entirely willing to ask the court reporters to read to you, word for word, all of my original instructions. I have been summarizing them and just hitting the highlights. I'm doing that because

I assume that that satisfies what your question is. But I am entirely willing to ask the court reporters to read it back again, word for word, and I must tell you that every single word of the instructions is important. Every part of it is important legally.

In spite of the length of it, I want you to be assured I wouldn't put anything in there that I didn't think was important to the case. So I have tried to highlight it to bring it back into your minds, but if any of you have any question about it, or if any of you want the whole thing read back again or any part of it read back word for word, just put that in a note that that is what you want and the Court will be entirely willing to arrange for the court reporter to do that for you.

All right. Would you now withdraw to the jury room?

(Jury left the courtroom at 3:15 p.m.)

THE COURT: All right, gentlemen. Please stand by for whatever comes next. Thank you.

MR. FARRELL: Thank you.

(Recess.)

(The following took place at 4.10 p.m.)

MR. FARRELL: Your Honor, before the jury comes back I have a point about the special interrogatories which I had previously overlooked,the answer to Question 3.

Question 3 is obviously the contract implied in fact interrogatory and Question 4 is the quasi-contract interrogatory. However, after --

THE COURT: Wait a moment.

MR. FARRELL: After Question 3 it says if your answer to Question 3 is yes then omit Question 4. The jury was instructed they could find on more than one theory and they could find on implied in fact or quasi-contract.

THE COURT: What they were instructed was that if the damages were greater on a theory they could award the greater theory.

MR. FARRELL: But they could find on both theories.

THE COURT: I don't know how they could. If you had a contract in fact that would preclude a contract in law, wouldn't it, a quasi-contract?

MR. MacCRATE: I believe it does.

MR. FARRELL: Your Honor, it seems to me that the interrogatory as presently framed to go on Question 5 is improper in that it gives them no chance to answer

Question 4.

THE COURT: Could you have both?

MR. MacCRATE: If a contract in fact has been found then a quasi-contract does not lie as a matter of law.

THE COURT: That is probably so.

MR. FARRELL: There is a choice between them and they should be given the choice and not skip one.

THE COURT: If your answer to Question 3 is yes then the question to Question 4 is irrelevant because you don't have a quasi-contractual claim if you have an implied contract because they are mutually exclusive.

MR. FARRELL: Your Honor, it seems to me if they are mutually exclusive the jury should be instructed and instructed to consider both Questions 3 and 4 together. The way it is worded now is that Question 3 precludes consideration of Question 4.

THE COURT: Since I delayed answering the jury's last question, let me reserve on this matter and come back. I want to tend to Court's Exhibit 8 first.

Bring in the jury, please.

(Jury returned to the courtroom at 4.13 p.m.)

THE COURT: Members of the jury, before I begin to comply with your note I understand from prior statements made to the clerk during the course of the trial that one of you has a car parked in a lot?

JUROR NO. 3: It has been taken care of.

THE COURT: All right, fine.

I am about to have the reporter read in compliance to your most recent note marked as Court Exhiit 8 for identification.

(Charge read as requested.)

THE COURT: Members of the jury, you may now return to the jury room.

(Jury left the courtroom at 4.25 p.m.)

THE COURT: I would like to see counsel inside.

(The following took place at 5.05 p.m., jury not present.)

THE COURT: We have a note which has been marked as Court Exhibit 9 which reads as follows:

"Please, may the jurors have the following testimony of Stanley Learned, Dr. Fischbeck."

When you read them, read them without any colloquy or any questions as to which I sustained an objection or struck out the answers, if you please.

(Jury returned to the courtroom at 5.10 p.m.)

THE COURT: You may begin by reading the testimony of Stanley Learned.

(Testimony read from page 2239 to 2248, lline 7.)

THE FOREMAN: Is there any way to expedite the testimony so that we could request to hear something in particular?

THE COURT: Yes, indeed you can but you have to make the request by note and the jury has to know certainly exactly what part of the testimony they want to hear and then I will limit the reading to that particular part of the testimony.

I might say something else to the jury while you are all out here. Ordinarily I would expect, and in view of the hour, to break between 6 o'clock and 6.15. If that doesn't suit the jury and the jury wants to leave earlier and return tomorrow morning you can do that.

If the jury wants to stay and have dinner and come back and deliberate, that may be done also. You can take any course that the jury finds satisfactory.

But unless there is complete agreement, that is say unless every juror is desirous of doing it differently I would ordinarily break between 6 and 6.15 and I don't think by that time we would be able to read all this testimony but why don't you go back and talk and if you want to limit the reading to any particular topic or subject matter, then I will attempt to comply with that. But please try to be as specific as you can because I wouldn't want to leave anything out that may be necessary to comply with your request.

Please return and see if you want to send out a note.

(Jury left the courtroom at 5.15 p.m.)

(Note received from jury at 5.20 p.m.)

THE COURT: I have two things to take up with you, gentlemen.

I have another note which has been marked as Court Exhibit 10 which reads as follows:

> "Specific testimony of Stanley Learned (or Dr. Fischbeck if applicable) when Phillips stated they would take independent course. (Specific mention to date.)"

That is the note and you might even be able to obviate the reading of the testimony if you want to stipulate the date.

Is this date that is capable of stipulation?

MR. MARKS: It is not capable because Mr. Learned was asked and testified about that date differently on cross-examination and about prior testimony.

THE COURT: In that case we will read it.

Now, the jurors have orally told the United States Marshal and he repeated it to me orally that they would like to have it read to them tomorrow. They would like to break for the day and resume tomorrow.

MR. FARRELL: Satisfactory, your Honor.

THE COURT: I'll get ready to excuse them. I would like you to agree on what pages and lines will be in compliance with the question so that there will be no controversy about it.

MR. MacCRATE: We will undertake to do that.

THE COURT: You might stay tonight a few minutes and do that.

Please bring in the jury.

(Jury returned to the courtroom at 5.25 p.m.)

THE COURT: Members of the jury, I have your most recent note and the United States Marshal advised me that the Foreman stated that the jury wishes to break for the day and resume tomorrow. That is perfectly fine with me and I ask you to return at 10 o'clock tomorrow morning.

There are a few important observationsd I want to make before you leave.

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No. 1, it is extremely important that none of you discuss this case with anybody between now and the time that you resume your deliberations. That includes family members and, of course, it includes any attorney or any person working in the Court House or anybody else.

The jury deliberations up to this point are entirely confidential and nothing whatever is to be disclosed unless and until you reach the time when you are ready to present a verdict.

Secondly, when you return tomorrow do not commence discussing the case until all six of you are present in the jury room because it is essential that each juror be entitled to equal participation in the deliberations and it would be improper if a few of you get in early to begin talking about the case until everybody is in the jury room. So please be on time.

The third thing is all of you have been so faithful in your attendance, please stay well and please be sure to be here tomorrow because at this stage of the trial we have no more alternates so we would like to get a verdict in this case, so be well and be sure to be here tomorrow.

Based on those instructions, you may now withdraw from the courtroom and I will resume with you at 10 o'clock in the morning.

(Jury left the courtroom.)

THE COURT: If you can write out what is responsive to this last question and leave it with the clerk and that would be helpful. If you can't agree on it I will reserve the first thing in the morning. If you want to look at the last note you may. Otherwise we will be in recess.

(Adjourned to Tuesday, January 27, 1976, at 10.00 o'clock a.m.)

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PRUDENTIAL OIL CORPORATION

vs. 67 Civ. 3748

PHILLIPS PETROLEUM COMPANY.

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New York, January 27, 1976;
10.05 o'clock a.m.

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(Open court, jury not present.)

THE COURT: Good morning, gentlemen. Can we go on the record? Have you all agreed on the page numbers to be read? Our jury is ready to go.

MR. MacCRATE: Mr. Farrell has just asked me for two additional pages and I am checking those, your Honor, and I will be able to report momentarily.

(Pause.)

THE COURT: Are you now in agreement, gentlemen?

MR. MacCRATE: I think we have gone pretty far afield, but I won't object to reading of that portion.

MR. MARKS: The pages, your Honor, would be, from Mr. Learned, starting at page 1496, line 9 to page 1498, line 7.

Page 1598, line 1 to 1612, line 9.

And from Mr. Fischbeck, page 1375, line 4 to page 1379, line 16; page 1437, line 7 to Page 1446, line 15, and page 1451, line 3 to page 1453, line 15.

THE COURT: Could I see the note, please? I think it is Exhibit 10.

Gentlemen, I have a suggestion. I make it with some reticence.

You have submitted a substantial number of pages to read and, of course, I will direct them to be read. However, the jury apparently is just asking for one thing and that is the date when Phillips stated they would take an independent course, and I just wonder why you couldn't stipulate what that date was.

MR. MARKS: It is in dispute.

MR. FARRELL: It is one of the most disputed facts in this case.

THE COURT: How disputed is it in days?

MR. FARRELL: It is disputed in years.

THE COURT: Really?

MR. FARRELL: Two years.

THE COURT: All right.

Bring in the jury.

(Jury present.)

THE COURT: Good morning, members of the jury.

We will now read the pages requested in Court's

Exhibit 10.

Would you begin to read, please, Mr. Knupple.

(The Court Reporter read the following from the transcript: Page 1496, line 9 to page 1498, line 7, and page 1598, line 1 to page 1612, line 9.)

THE FOREMAN: Excuse me.

Your Honor, that is all we wanted to hear.

THE COURT: Very well.

Do all the jurors agree with the statement of the foreman?

(The jurors answered in the affirmative.)

THE COURT: All right. Then you may withdraw and resume your deliberations.

(Jury left the courtroom at 10.30 a.m.)

THE COURT: All right, gentlemen, we will be in recess.

(Recess.)

(11 o'clock a.m.)

THE COURT: Please bring in the jury.

(Jury present.)

THE CLERK: Mr. Foreman, have you agreed upon a verdict?

THE FOREMAN: Yes, I have.

THE CLERK: Question 1:

"Did Prudential Connecticut, acting through Mr. Shippee, Mr. Willey and/or Mr. Young develop and own a legally protected business concept, as the Court has defined that term, relating to the establishment of a petrochemical core plant in Puerto Rico?"

THE FOREMAN: Yes.

THE CLERK: Question 2:

"Did Phillips obtain disclosure of this legally protected business concept as a result of a relationship of trust and confidence with Prudential Connecticut?"

THE FOREMAN: Yes.

THE CLERK: Question 3:

"Did Prudential Connecticut disclose its concept, if any, to Phillips, or make a contribution of ideas or services relating to the development of those ideas, as a resulot of a 'Contract implied in fact,' as the Court -as defined that term, that existed between Prudential Connecticut and Phillips?"

THE FOREMAN: Yes.

THE CLERK: Question 5:

"Did Phillips use Prudential's legally protected business concept or contribution of ideas or services relating to the development of those ideas of Prudential Connecticut in the petrochemical facility actually constructed in Puerto Rico or in any application or presentation necessary to effect its construction?"

THE FOREMAN: Yes.

THE CLERK: Question 6:

"The amount of damages awarded to Prudential is"?

THE FOREMAN: 1.5 million.

THE CLERK: 7(a):

"On what date did Phillips misappropriate the ideas of Prudential in violation of a confidential relationship, or take such ideas pursuant to a contract implied in fact?"

THE FOREMAN: December 16, 1963.

THE CLERK: Members of the jury, listen to your general verdict as it was stated and stands recorded:

You find for the plaintiff in the amount of $1-1/2 million.

(The jurors were asked individually, "Is that your verdict?" and each answered in the affirmative.)

THE COURT: Would you hand the original verdict signed by the foreman to the clerk, please.

(Handed to the clerk.)

THE COURT: May I see it?

(Handed to the Court.)

THE COURT: At this time I will direct that the special interrogatories be filed.

I will thank the jury for their service, and I will inform you that the clerk has your certificates.

The Court appreciates your attendance here and the fact that you have made yourselves available during the time of this case, which was greater than the normal jury service expected here in this District.

The Court woukd also say to you that now you have your full rights of free speech and my directives that you not discuss the case are at an end. You now can say or do anything you like.

By the same token, no person can require you to discuss or explain or give any reason for your decision or make any statement with respect to the functioning of the jury, and I ordinarily tell jurors that you may be more comfortable if you decline to discuss the matter with anyone. However, you have your full rights of free speech of every American citizen and you can do or say as you wish.

I hope that you have found your attendance here in this Court House interesting and rewarding, and I do appreciate your performance of your civic duty here in this case.

I have also been specifically asked by Mr. Jemison, one of the attorneys who is not here, if I would convey his thanks and appreciation. He went back home to Oklahoma to attend to an adoption proceeding where he and his wife will become the adoptive parents of a child, and he had to be present there in court, and that is the reason you don't find him here today when you announced your verdict.

All right, you are excused with the thanks of the Court.

(Jury left the courtroom.)

THE COURT: Gentlemen, in view of the fact that the final judgment here will also dispose of equitable claims, I think there should be a final judgment settled on notice upon the clerk's minutes and my findings made at the close of the plaintiff's case.

MR. FARRELL: Yes, your Honor.

THE COURT: And I ask you to settle that either on notice or on a waiver of notice, whicever is agreeable to the attorneys.

MR. FARRELL: Your Honor, we do intend to include in that award interest from December 16th, and I won't make a separate motion, but I will put that in the proposed judgment, and you will rule as you see fit, but that is what I am going to do.

THE COURT: As I understand, that is regulated by Section 5001 of the CPLR.

MR. FARRELL: I believe that is right.

MR. MARKS: The law is clear on that. We have the cases.

THE COURT: I haven't been able to pinpoint the blame for the delay by the plaintiff by anything that has been said to me, so I would assume it is probably entitled to its interest under the act. You will have to give us a schedule of what the rates were because they changed during these many years.

MR. FARRELL: I know.

THE COURT: All right.

Is there anything further, gentlemen?

MR. MacCRATE: Well, I would move at this time, your Honor, for a judgment notwithstanding the verdict and I would propose to move for a new trial at the appropriate time.

THE COURT: Well, I think it would be best if any such application be made on papers. The only possible matter I could see would be the question of whether it is excessive. In effect, this jury has told us that this plaintiff furnished three times the value of Coan and Chapman, and whether that is excessive or not, I am not so sure. But I think you ought to come in on reasonable papers, not too lengthy, and give your adversary a chance to respond to them.

MR. MacCRATE: We will be prepared to do that, your Honor.

THE COURT: I will enlarge the time if need be, but I think you will have enough time since the judgment will be entered on notice.

All right. I thank all you gentlemen for your prompt attendance during this rather lengthy case.

MR. FARRELL: Well, thank you, your Honor.

THE COURT: At least I am glad it is over.

MR. FARRELL: And so are we.

THE COURT: All right. Good morning, gentlemen.

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